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THE

Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, VIZ., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF HER MAJESTYS' PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND, Middle Temple.

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(1) Plaintiff was the purchaser and owner of a hoondee from the holder or person who had deposited the consideration-money; and he endorsed the same for realization only. Defendant was the purchaser of the hoondee (after it had been lost or stolen) by means of a forged special endorsement to his vendor before acceptance, and a forged endorsement to himself after acceptance. The question was whether the defendant, by reason of having been a purchaser for valuable consideration, without notice of his vendor's want of title, obtained a good title to the hoondee, notwithstanding the two forgeries. HELD that, in considering the right to a hoondee, a reasonable construction must be put upon the words of an endorsement or acceptance, and when a Hindoo maker or rightful owner of a hoondee payable in terms to the *Shajoog* or a respectable holder thereof, endorses it as sold or sent to A, he obviously means to pass the right of dealing with the hoondee to A alone; and after a special endorsement to A, the hoondee cannot be validly transferred to B, otherwise than by A or by A's authority ... 3

(2) *Semble.*—There is no rule of Hindoo law, customary or otherwise, which would have the effect of making the word *Shajoog* mean payable to *bearer*, quite independently of the endorsements; nor any principle of mercantile expediency, having the force of law or otherwise, which would be served by disregarding the direction of the endorser, and treating a specially endorsed and specially accepted hoondee as if it were an English negotiable instrument made payable to bearer 3

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(4) *Semble.*—Before acceptance at any rate, a hoondee payable to *shajoog* would pass by delivery merely, without regard to the authenticity or otherwise of any special endorsement upon it ... (*foot note*) 10

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(2) A Magistrate is not competent to interfere under Section 318 of the Code of Criminal Procedure with the execution of a decree of the Civil Court. When a Civil Court decree has been passed regarding the whole or any portion of disputed land, it is the Magistrate's duty to maintain that decree, and he cannot again institute proceedings under Section 318 regarding the land covered by it 24

(3) The High Court declined to interfere in four cases of dismissal by the Magistrate and Deputy Magistrate referred by the Judge — the *first*, because the Judge considered that mere persistence in demand of rent did not amount to trespass justifying the right of private defence as held by the Magistrate — the *second*, because the Judge considered that the Magistrate's reasons, *viz.* (1) want of explanation of the cause of complainant's *presence* on the spot where the alleged assault was committed, (2) want of explanation of *delay* in making complaint, and (3) want of material evidence in the shape of *bruises*, were not sufficient in law to justify a summary dismissal — the *third*, because the Judge considered that the mere assertion of a claim to land by the accused did not justify the dismissal of the criminal charge as to theft of its produce, and that the Deputy Magistrate should be directed to hold a proper enquiry and dispose of the case after recording evidence; — and the *fourth*, because the Judge considered that delay in making complaint was not of itself a legal ground for dismissal, particularly where an explanation of the delay is tendered 75

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(2) Where the accused represented to the prosecutor that a girl was a Brahmin, and thereby induced him to part with his money on consideration of the marriage of the girl to his brother, when the girl really was of the Sudra caste, it was held that he was guilty of cheating by false personation, under Section 416 of the Penal Code 42

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(2) Where a —— has committed some impropriety for which he cannot be criminally prosecuted, the High Court may *suo motu* institute proceedings, and on reasonable cause other than professional misconduct, may suspend or dismiss the —— without a written charge or notice, so long as the —— had every facility of knowing the charge and of awarding it 15

(3) Case of a —— who was re-instated by the High Court to his practice after suspension by reason of his having been convicted in two cases, the circumstances of these cases not showing that the —— was guilty of any moral turpitude, or that he was unfit to act in the Criminal Courts as a —— ... 41

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(2) A previous sanction to the establishment of a trade does not entitle the proprietors to continue the business after it has become a public nuisance to the neighbourhood 6

(3) No one has a right to corrupt the air of a particular locality by the exercise of a noxious trade, simply because at the commencement of the nuisance no person was in a position to be injured by it; and no prescriptive right can be acquired to maintain, and no length of enjoyment can legalize, a public nuisance involving actual danger to the health of the community... 6

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(1) Where a prisoner was properly convicted on the evidence of illegally seizing cattle, but was sentenced under the old law (Act III of 1857), but that Act had been repealed by Act I of 1871, the High Court declined to interfere with the sentence as the latter Act was in force at the time of the conviction and sentence, and no injustice had been done ... 12

(2) Where a prisoner, under Section 227 Code of Criminal Procedure, gives in a list of the witnesses he wishes to summon, after his case has been committed, the Magistrate is bound to exercise his discretion upon the point, and to state whether he would summon the witnesses or not, and he ought to state his reasons for not doing so. If he thinks the witnesses were included in the list for the purpose of delay, he should proceed under Section 228 of the Code ... 14

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(3) Evidence in support of a complaint must be taken and considered before a Magistrate can discover the complaint. A mere plea by the accused that the property, of the theft of which he is charged, is his own property, unsupported by proof, or by some circumstances which tend to indicate that there is some truth in the statement, is not sufficient to entitle him to be summarily discharged ... 18

(4) A Jury may be satisfied with a minimum of proof, and it is beyond the power of the High Court in such cases to interfere with its verdict; but when there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot under such circumstances be sustained. 19

(5) In a case in which the prisoner was charged with murder, and he made a confession that he did strike deceased with a stick, the Sessions Judge, after considering the evidence, discredited the confession and all the evidence except that of the Medical Officer, and discharged the prisoner, not considering it necessary that the case should go before a Jury. HELD that the Sessions Judge had no right to pronounce his own judgment on the credibility of the evidence, and to withdraw the consideration of the due weight to be given to the evidence from the Jury 20

(6) The discretion of a Magistrate under Section 202 Code of Criminal Procedure to ask questions of an accused is entirely unfettered, though an examination under that Section should not be of an inquisitorial nature, and a Magistrate should inform the accused that he is not bound to answer. Answers to questions under that Section are admissible in evidence; even if the Magistrate has omitted to warn the accused, he need not answer 21

(7) A Jury appointed under Section 310 Code of Criminal Procedure, is not legally constituted when the Magistrate appoints only the foreman of the Jury. The award of a Jury under that Section long after the expiry of the time fixed for giving an award is illegal, and cannot be upheld by a Magistrate, who should in such a case take up the case himself and decide it. 23

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(8) *Held by Ainslie, J.*, that in cases falling under Chapter XV Code of Criminal Procedure, the accused person has no right to a summons to a witness after the Magistrate has proceeded under Section 206 of the Code to hear him and such witnesses as he shall then produce in his defence; that in cases falling under Chapter XII, the accused has no right to a summons, except in respect of persons named by him in a list to be given at once on hearing the charge, or on hearing and being furnished with a copy or translation of the charge; and that, in cases under Chapter XIV, the Magistrate is bound to summon only witnesses mentioned at the time when the accused is put on his defence under Section 252, or at some time previous to this, and that it is discretionary with the Magistrate to summon other witnesses,—the words "at his discretion" in Section 253 being read with Section 251, and so with Sections 189 and 191.

Per Paul, J. (contra.)—When a prisoner is put upon his trial and applies to have any witnesses subpœnaed, the Magistrate is, according to the true construction of Section 253, bound to summon those witnesses, though he is not obliged to adjourn the trial,—an application for subpœnas upon witnesses being quite a different thing from an application for an adjournment ... 28

(9) It is the duty of a Judge to take care that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the Jury any evidence save that which has been legally put in in the particular case which is under trial ... 36

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(12) *Per Glover, J.*—Where the Criminal Procedure Code makes it necessary for a Magistrate before dismissing a charge to examine both the complainant and his witnesses, it supposes that there has been already a *primâ facie* case made out; and where the complainant makes out such a *primâ facie* case, the Magistrate is bound, first, to examine all the complainant's witnesses before dismissing the charge; but in a case where there is clearly no *primâ facie* case established, the Magistrate is justified in acting under Section 67 Code of Criminal Procedure, and in dismissing the case at once 39

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LIMITATION.—(*Continued.*)

receipts were not receipts which could be alleged to be receipts by a tenant in common, antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, the separate collections of each party having to be dealt with as if received from the agent or collector. HELD that the statute of limitation could not apply to a claim by one owner against the other as for the collections made during twelve years previous to the institution of the suit, one party having received more one year and less the previous year; and that it would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date ... 1

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(3) The title of a judgment-creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor. The possession of such purchaser, if *bonâ fide* and without notice of the mortgage, is the possession of an owner; and a suit by a mortgagee against the purchaser founded on a title to enter into possession by reason of a default having occurred ought to be brought within twelve years after the commencement of the purchaser's possession 19

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(4) A sum of 2 lacs of rupees which had been paid by a debtor in part satisfaction of a larger sum due to the shareholders (among whom were the plaintiff and the defendants), the heirs of a deceased banker, according to their shares in the estate, was appropriated by the defendants. The several share-holders brought separate suits against the debtor for their separate shares, the result of which suits was that the 2 lacs was appropriated to the whole debt and the plaintiff's claim was thereby reduced by 25,000 rupees, while the defendants received 16,000 rupees more than that they were entitled to from the common debtor. The present suit was brought by the plaintiff against the defendants for his full share of the 2 lacs. The defendants pleaded that the suit was barred by limitation, more than twelve years having elapsed from the date of the original payment of the 2 lacs. HELD that plaintiff's cause of action arose out of the result of the former suits against the debtor, and not out of the original payment of the 2 lacs, and limitation ran, not from the date of the original payment, but from the time that the defendants received more than their proper share 20

(5) HELD also, that the plaintiff was entitled to recover from the defendants, not the full sum of 25,000 rupees which he had lost as the result of the proceedings against the debtor, but the 16,000 rupees which the defendants had received over and above their proper share, and which must be considered as money had and received by the defendants to the plaintiff's use ... 20

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upwards of twelve years before the institution of this suit, and had been followed for upwards of twelve years by registration and mutation of names in the Collectorate. *A*, the mortgagor, made default, much more than twelve years before the commencement of this suit. *B* having obtained a decree for foreclosure in a suit which he brought against *A* alone. *C* paid *B* off, took a transfer of his mortgage, and in his turn sued *A* alone and obtained a decree for foreclosure. *C* then brought this suit against *D*, who pleaded twelve years limitation in bar. HELD that *C* acquired no right against *D*, who was no party to the foreclosure proceedings, except that which was conveyed to him by his securities, and the right he had under the mortgage deed was to obtain possession of the land, his cause of action as to which accrued when the mortgagor made default; and as that was more than twelve years before suit, *C* was barred, the exception in Section 6 Act XIV of 1859 not applying to this case, *D*'s possession being in no sense possession by permission of the mortgagee 33

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(2) A compromise set up by the defendants in the present suit having been rejected, a decree was given to the plaintiffs for the sum of Rs. 62,913 awarded in the original suit. That decree was upheld in appeal; but as it was alleged that on the facts stated in the plaint in the original suit the plaintiffs' mother's share of the dower was one-eighth, and not one-third, the Privy Council held that plaintiffs ought not to benefit by that mistake, if it was a mistake, and they accordingly left it to the Lower Court to enquire into that point and to let execution go for the one-eighth or the one-third share, according as the fact might turn out 22

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The Weekly Reporter,

APPELLATE HIGH COURT.

The 1st June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Sale of under-tenures—Sections 106 and 107 Act X of 1859—Intervention—Proprietor's remedy.

Case No. 284 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 22nd December 1870, *affirming a decision of the Moonsiff of Sonamookhee, dated the 27th June* 1870.

Golam Chunder Dey (Plaintiff) *Appellant,*

versus

Nuddiar Chand Adheekaree (one of the Defendants) *Respondent.*

Baboos Chunder Madhub Ghose and *Bama Churn Banerjee* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Sections 106 and 107 Act X of 1859 apply only to cases in which the existence of the under-tenure and the decree-holder's right as landlord are admitted, not where they are denied and an adverse *proprietory title* is set up by the claimant as owner of the land.

The remedy open to the owner of the land in such a case is under Section 77 before the decree is made; but after he allows it to be made, he cannot have it set aside in execution.

Ainslie, J.—PLAINTIFF obtained a decree for arrears of rent of an under-tenure against Nund Kishore Singh and others. In execution of this decree, he applied to the Collector for the sale of the lands in suit under Section 105 Act X of 1859.

Defendant opposed the sale, averring that a portion of the lands which plaintiff proposed to sell are not part of the mal lands of the plaintiff, but are lakheraj lands belonging to Nund Kishore and held by him (defendant) under Nund Kishore, and that in the remaining portion neither plaintiff nor Nund Kishore have any interest whatever. His objections were allowed and the sale was stayed.

Plaintiff now sues to establish his title as proprietor of the said lands, and both the lower Courts have held that his suit is out of time under Section 107 Act X of 1859.

Plaintiff appeals specially on two grounds; 1*st*, that Sections 106 and 107 do not apply under the circumstances of this suit; and 2*nd*, that the suit was instituted within one year from the final order in appeal from the order of the Deputy Collector.

By Section 107 no appeal is allowed, and plaintiff by filing an appeal contrary to the provisions of the law cannot gain extension of time.

The question we have to answer is whether Sections 106 and 107 apply only to cases in which the existence of the under-tenure and the decree-holder's right as landlord are admitted, or also to cases in which they are denied and an adverse *proprietary title* as owner of the land is set up.

The point appears never to have been decided in this Court, and the pleaders are aware of no case like this.

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Section 105 provides that an under-tenure which by law or custom is transferable by sale, may be sold under a decree for arrears due in respect of that under-tenure.

Section 106 is as follows:—" If, before " the day fixed for sale of any such under-" tenure as aforesaid in execution of a de-" cree for arrears due in respect of such " under-tenure, a third party appear before " the Collector and allege that such third " party, and not the person against whom " the decree has been obtained, is *the pro-" prietor of such under-tenure* and was in " lawful possession of the same at the time " when such decree was obtained, the Col-" lector shall under certain conditions pro-" ceed to enquire into and adjudicate upon " the claim, &c."

The words " proprietor of such under-" tenure" seem to us to denote that the objection provided for is one which admits the existence of the under-tenure, and therefore the title of the decree-holder as landlord, and only questions the propriety of the sale on the ground that the claimant and not the judgment-debtor is the party against whom a decree, if any, should have been made as holder of the under-tenure. The last Clause of the Section can only refer to such objections. It provides that unregistered transfers of *under-tenures*, the registration of which is required by law, shall not, unless sufficient cause be shewn for non-registration, be allowed to defeat the landlord's right to sell the tenures.

The respondent contends that the words " proprietor of such under-tenure" admit of being interpreted as including one who claims as landlord of the under-tenant or owner of the soil which forms the subject of the tenancy, and that the defendant consequently was a party who had a right of intervention under Section 106, and plaintiff must therefore be bound by the provisions of Section 107. The law, it is said, provides for the protection of persons who were no parties to the suit in which a decree under execution was obtained—and if defendant could not come in as an intervenor under Section 106, he had no remedy at all, but must submit in silence while his property was sold.

Doubtless, any person exposed to injury by acts done in execution of a decree *inter alios* ought to have some relief, and if it were really the case that the defendant would have been injured by a sale under Section 105 there might be some question whether he could not be included among those entitled to intervene under Section 106; but it seems to us that such is not the case here. The expression " under-tenure" in Sections 105 and 106, is, in our opinion, used in relation to the person executing the decree and means a tenure held under and created by him or those whom he represents: consequently, no right held under another and not capable of being exercised within the decree-holder's estate, or that estate of the rents of which he was in *bonâ fide* receipt and enjoyment, passes by a sale under the former Section, and no interest external to that estate can be injured by such sale.

When it is proposed to hold a sale of an under-tenure under Section 105 in satisfaction of a decree for arrears of rent due in respect thereof, the decree is *primâ facie* evidence and a declaration to all persons that the under-tenure to be sold is one which exists within the boundaries of the judgment-creditor's estate, or at least of that estate of which he is in *bonâ fide* enjoyment by receipts of rents; and by the form of the proceeding the creditor declares that he has no intention of touching any thing not held under himself or of travelling beyond the bounds of his own estate.

If we look at the procedure for the sale of under-tenures in execution of decrees under Sections 105 and 109, we see a very marked difference. Under the former, the decree-holder sells a definite thing: under the latter he sells only rights and interests of his debtor. Under the former the proceedings are under Act VIII of 1865, Bengal Council, and the decree-holder is bound to register the transfer and acknowledge the purchaser as his tenant, and the latter acquires the tenure free of incumbrances, saving certain exceptions. Under the latter, the proceedings are under Act VIII of 1859, and there is no guarantee of title or any special assistance or privilege given to the purchaser.

It is evident that there must be some weighty reason to account for this difference, and this is, we think, to be found in the fact that in one case the judgment-creditor is selling something that from the nature of the case is within his own control; and in the other, he is dealing with that which is not necessary within his control.

Thus it appears that if the decree-holder be acting *bonâ fide*, he cannot be infringing

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on the rights of other land-holders ;—if *malâ fide*, the sale is a nullity and cannot hurt them. Consequently, it was only necessary to provide for claims to an under-tenure put up for sale under Section 105 advanced by persons claiming as holders under the decree-holder who alone are liable to be injured by sales held under this Section.

It has been urged that if defendant's claim did not come under Section 106 it must have come under Section 110, and then plaintiff would be bound by the provisions of Section 111. Now Sections 109 to 111 refer to property including under-tenures, other than the under-tenure on which the arrear accrued for which a decree has been made : but it is manifest from the proceedings of the Courts below that plaintiff was seeking to sell the very tenure on which the arrear accrued. This contention, therefore, falls to the ground.

Reverting to the plea of hardship to the defendant if he is allowed no remedy either under Section 106 or Section 110, we think that a remedy exists under Section 77,—he might have prevented the making of the decree, if in fact he was the owner of the lands the rent of which the plaintiff sought to recover and in receipt and enjoyment of the rents thereof; but having allowed the decree to be made, he ought not to have been allowed to set it aside in execution. Having given up the opportunity of asserting his rights which, if attacked at all, were attacked by the decree, and not by the sale, he should have been left to establish them in a regular suit. In such suit he would have been plaintiff. The accident of his being defendant in this suit, which arises from a mistake as to his right of intervention under Section 106, cannot give him any title to set up limitation under Section 107 against the present plaintiff.

We, therefore, reverse the decisions of both the lower Courts and remand the suit to the first Court for trial on the merits with reference to the remarks in this judgment. Costs to follow the result.

The 1st June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Mahomedan Law—Pre-emption.

Case No. 217 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 9th December 1870, *reversing a decision of the Moonsiff of Tegrah, dated the* 31*st May* 1870.

Chamroo Pasban (Plaintiff) *Appellant,*

versus

Puhlwan Roy and another (Defendants) *Respondents.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Lukhee Churn Bose for Respondents.

To establish the right of pre-emption, the *tulluba-ishtishad* or affirmation before witnesses, must be performed in the presence of the person in possession of the lands, whether it be the vendor or the purchaser.

Bayley, J.—In this special appeal the pleader has confined his arguments to the second ground, the first being abandoned by him.

Both the lower Courts have found as a fact that the tulluba-ishtishad had not been duly performed, and that the affirmation before witnesses had not been made in the presence of the purchaser or the vendor.

The substance of the oral pleadings before us varies somewhat from the apparently purposely vague grounds of special appeal. The pleader, however, argues that the presence of the vendor and the purchaser is not essential, and cites Volume III, Calcutta Edition of the Hedaya, page 571, in support of his contention; but the words there used are that the affirmation shall be "against

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the vendor, or the purchaser." The pleader argues that the word "against" does not mean "in the presence of." Bearing in mind, however, the general scope of the law and the strictness which has to be followed in the pre-emption cases which are contrary to the ordinary policy of civil rights, the affirmation before witnesses is required to be in the presence of the vendor and the purchaser in order that they may know what is being done against their interests. So that from the very passage that the pleader for the special appellant cites in his favor, it is quite clear that whether it be the vendor or the purchaser, whoever is in possession of the lands, should be present to witness to the affirmation.

In this view, we think that the judgment of the Lower Appellate Court is perfectly correct. We, therefore, dismiss this special appeal with costs.

The 1st June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Measurement papers—Nazir's report —Evidence.

Cases Nos. 2616, 2617, and 2623 of 1870.

Special Appeals from a decision passed by the Subordinate Judge of Sarun, dated the 12th September 1870, affirming the decisions of the Sudder Moonsiff of that District, dated respectively the 25th March and 18th May 1870.

Gobind Muhtoo and others (Plaintiffs) *Appellants,*

versus

Goopee Bhuggut and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Debender Narain Bose and *Bama Churn Banerjee* for Respondents.

Measurement papers cannot be treated as inadmissible in evidence because set aside by decisions of the lower Courts, if those decisions have been reversed by the High Court.

The report and map of a Nazir who is not examined in a case are no evidence whatever.

Kemp, J.—It is admitted that one decision will govern these three appeals. The plaintiff sued for possession of a clump of bamboos and one dhoor of land, valuing his suit at 10 rupees. The plaint alleges that the clump of bamboos and the land on which they stand appertain to the plaintiff's share of Phâut Kalan, and prays that the decision of the Collector dated the 17th March 1869, be reversed. The defendant's allegation is that the clump of bamboos and the land claimed by the plaintiff appertain to Phâut Khoord. Both Court have dismissed the plaintiff's claim.

In special appeal two grounds are taken ; 1*st*, that the lower Courts were wrong in holding the thakbust map and other measurement papers as bad on account of their being set aside by the decisions dated 16th May 1867 and March 1868, as these decisions were reversed by this Court on the 23rd of November 1868 ; and 2*nd*, that the lower Courts were wrong in relying on the report and map prepared by the Nazir of the Collectorate, for they cannot be taken as evidence in this case.

We think both these grounds are good grounds. It does appear on referring to the decision of this Court of the 23rd of November 1868 to be found in Volume X, Weekly Reporter, page 396, that the decisions referred to by the lower Courts were reversed by this Court, and therefore the plaintiff was clearly entitled to have a finding upon these documents, namely, the thakbust khusrah papers and map.

On the 2nd ground, we are clearly of opinion that the report and map of the Nazir, who has not been examined in the case, is no evidence whatever.

The case must, therefore, go back for a proper trial and in order that the plaintiff's documents may be considered and a fresh decision passed.

Costs to follow the result.

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The 1st June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Valuation of suit—Auction price—Market value—Act XXVI of 1867.

Case No. 2644 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 25th August 1870, *affirming a decision of the Moonsiff of Buxar, dated the 2nd May* 1870.

Mussamut Soobudra (Plaintiff) *Appellant,*

versus

Rajah Ram Prokash Singh (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and *Taruck Nath Paleet* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

In a suit for possession by an auction purchaser where plaintiff valued his claim at what he paid for the property, held that the valuation was *primâ facie* not incorrect, and until rebutted by evidence and the result of a proper enquiry, should be accepted as correct.

If the valuation was doubted, an enquiry should have been instituted under Act XXVI of 1867.

Kemp, J.—THE plaintiff in this suit is the special appellant before us. She sued to recover possession of a 5 annas share of a jote called Hoonkaha Toorkpoora, valued at rupees 906-10 annas. She alleges that this estate belonged to the Rajah of Buxar, that in execution of a decree against the Rajah the whole 16 annas of the parent mehal Chuckrowsee was sold on the 31st of July 1869 and purchased at auction for rupees 2,900 by the plaintiff and by Bhugwan Dass and Gokool Bhuggut, the plaintiff being the purchaser of a 5 annas share, Bhugwan Dass of a 7 annas, and Gokool Bhuggut of a 4 annas share. The plaintiff sues, as already stated, for possession of a 5 annas share of the jote. She alleges that on her amlah going to take possession, they were resisted by the defendant who set up a mokurruree under the judgment-debtor, the Rajah, and contended that the plaintiff was not entitled to khâs possession. The object of the plaintiff's suit, therefore, is to set aside this mokurruree, and she values her suit at rupees 906-10 annas, being the amount of auction-purchase money represented by her 5 annas share in possession.

The defendant objected to the valuation of the suit and contended that as the property was lakheraj property, it should have been valued at 20 times the net profits, and that if so valued the Moonsiff could not take cognizance of the suit.

Both the lower Courts have thrown out the plaintiff's claim without any enquiry whatever, holding that as the property is lakheraj it ought to have been valued at 20 times the net profits, and therefore that the suit must be dismissed.

Before proceeding to judgment in the case, we may observe that the first Court in the last part of its judgment says that whether the land be mal or lakheraj, the plaintiff had no right to put an arbitrary valuation upon it, but that according to the stamp law then in force she ought to have valued it according to the market value.

We think that the decisions of the Courts below are wrong. In the first place, the plaintiff assumes that the market value of the estate is what she paid for it at auction, and *primâ facie* such valuation would not be incorrect. It may be of course that the market value is much higher, but before summarily dismissing the plaintiff's case the Court below ought under the stamp law to have made an enquiry into the market value of the estate, and its decision after such enquiry would, with reference to the valuation of the suit, be final; but no such enquiry was made, and we cannot say that the plaintiff was wrong in valuing her suit at what she paid for the property at auction. We assume that to be the market value, and until rebutted by evidence and the result of a proper enquiry, such valuation was perfectly correct.

Then it is said that this being a lakheraj mehal, 20 times the annual profits of the estate must be assumed as the market value. We think that the lower Courts have come to a wrong finding with reference to this being a lakheraj mehal. It is clear that the Rajah, when in possession of the parent mehal Chuckrowsee, subsequently sold for arrears of Government revenue, held the disputed land as part of Chuckrowsee paying revenue to Government. Whether the auction purchaser obtained possession of the whole of Chuckrowsee is a matter with which he is concerned, and if any lands were withheld by the Rajah which ought to have passed to the auction purchaser, it is for the auction purchaser to seek his remedy. The

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Government did attempt to resume these lands, but their attempt failed, and it was held by the Special Commissioner that these lands belonged to the mal estate, and therefore that although the auction purchaser might have a remedy the Government could not resume these lands, and they were accordingly directed to be released.

The stamp law in force when this claim was instituted was Act XXVI of 1867, and under note "*a*" Schedule "B" of that Act, in any suit for immoveable property whether paying or not paying revenue to Government the market value was to be assumed as the proper valuation. If it was disputed or doubted that that was the proper valuation the Court was at liberty to make an enquiry, and on the result of that enquiry the valuation of the suit was to be made, and the decision of the Court with reference to such valuation was to be final. We think that this course ought to have been pursued. If the Court of first instance was of opinion that the valuation of the suit by the plaintiff did not represent the fair market value of the estate in dispute, it ought to have made some enquiry on that point. We, therefore, remand the case. The Court of first instance, if *necessary*, will make such enquiry; and if the present valuation is a proper one, will proceed to try the case; if it is not properly valued, the Court must give the plaintiff an opportunity to make up the proper valuation and then proceed with the case. Costs to follow the result.

The 1st June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Stamps—Documents—Admissability.

Case No. 194 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 25th November 1870, *affirming a decision of the Subordinate Judge of that District, dated the 15th June* 1870.

Enayetoollah and another (two of the Defendants) *Appellants,*

versus

Shaikh Meajan and others (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Baboo Rajendro Nath Bose* for Appellants.

Mr. R. E. Twidale for Respondents.

The provisions of the stamp law by which unstamped or insufficiently stamped documents are excluded, were framed primarily in the interests of the Government revenue, but were never intended to create or put an end to the rights of the parties. Where a document is admitted by the first Court as not requiring a stamp, its admissibility cannot be questioned in appeal.

Ainslie, J.—THE plaintiff in this suit sued as mokurrureedar to recover one-half of a certain mokurruree tenure from the defendant, who is the auction-purchaser in execution of a decree against the original *milikdar*, and who, subsequent to his purchase by means of certain proceedings under Act X of 1859, interfered with the plaintiff's possession. The plaintiff put forward a pottah of 1831 granted to 4 persons with a *ladavi* or deed of relinquishment executed by two of them in favor of the other two.

The defendant denied the genuineness of these papers; he objected that they were inadmissible on the ground of being unstamped or insufficiently stamped; he denied ever having dispossessed the plaintiff from his mokurruree tenure, and stated that the plaintiff never had possession within 12 years, and his claim was therefore barred by limitation.

The first Court admitted the pottah as not requiring a stamp under Regulation X of 1829, but did not admit the *ladavi;* and going into the whole of the case gave the plaintiff a decree.

The Lower Appellate Court has also found the pottah to be genuine and the objection on account of its being instamped immaterial. In respect of the *ladavi* the Lower Appellate Court agreed with the first Court that it was inadmissible, but held that the plaintiff's right under that deed was one which could only be questioned by the heirs of the grantors of the said deed, whereas those parties, although defendants in the case, did not take any such objection. The Lower Appellate Court also found that the pottah was genuine, that the plaintiff had possession under it and was dispossessed by the defendant, and therefore upheld the judgment of the first Court.

The points urged in special appeal are (1) that the pottah and the *ladavi* being unstamped and insufficiently stamped were not at all admissible in evidence; (2)

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that the *ladavi* not having been proved, the plaintiff can have no title to so much of the holding as belonged to the persons who executed that *ladavi*; (3) that the Lower Appellate Court has come to no finding as to whether the plaintiff was in possession within 12 years of suit under the pottah put forward by him; and (4) that as the plaintiff's possession under an ijarah is admitted by the defendant, the Lower Appellate Court's finding is incomplete and does not dispose of the question of limitation.

With respect to the inadmissibility of the pottah on account of its being unstamped, we would refer to the judgment of the late Chief Justice, Sir Barnes Peacock, in Volume XI, Weekly Reporter, page 520.—He says:—"I am of opinion that in regard "to the want of stamp, it is not a ground "for reversing the decision, because I think "that the error, if any, of receiving the do-"cument without a stamp did not affect the "merits of the case or the jurisdiction of "the Court, although it might have affected "the Government revenue."

It has been pressed on us that the admission of the pottah, which is the foundation of the suit and which under the stamp law is said to be inadmissible, really does effect the merits in the present case, inasmuch as if this were withdrawn from the record there is no saying at what conclusion the Courts below would have arrived.

We think that the provisions of the stamp law by which unstamped or insufficiently stamped documents are excluded were never intended to create or put an end to the rights of the parties to a suit, but primarily in the interests of the Government revenue. It is perfectly immaterial as between the parties to a suit whether a certain document does or does not bear a certain mark which goes to show that the Government dues had been paid. The only thing which is necessary to be seen as between them is whether the document is genuine or not. No authority has been shewn to us against the decision quoted above. On the other hand, several other cases may be quoted as following the judgment in Volume XI, and we have no doubt that, as frequently held by this Court, the question of admissibility of a document is one for the first Court to decide, and that question having been decided by the first Court the decision should be final.

On the *second* point, *viz.*, the *ladavi* not having been proved, we think this question is perfectly immaterial. The pottah is in the possession of the plaintiff. The Judge has found that the pottah is genuine; he has found that the plaintiff held possession under that pottah, and under such circumstances it becomes unnecessary to enquire as to how the possession of the whole of the property passed to the plaintiff.

As to the objection that the finding of the Judge below is incomplete, we have only to remark that the Judge has considered at great length the several objections urged before him, and that he winds up in the following words:—"It is needless to "recapitulate all the arguments used by the "Subordinate Judge. I need only say that I agree with him in all material points." Further "I see no other way of accounting "for the plaintiff's possession at any time "otherwise than by the supposition that his "pottah is genuine, or of accounting for the "cessation of that possession otherwise "than by the disturbance against which he "has laid this suit." In other words, the Judge says that the plaintiff had possession; that he produced a pottah under which he said he was in possession, but that the defendant alleged that he held under a *mustajiri* title which however was not proved; and therefore it must be taken that the plaintiff was in possession under the pottah and that alone, and that possession lasted until such time as the defendant dispossessed him as set forth in the plaint. This, it is admitted, brings the case within time, and we think therefore that the special appeal must be dismissed with costs.

The 1st June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Reviews—New evidence.

Case No. 200 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 17th January 1871, *affirming a decision of the Moonsiff of Arariah, dated the 2nd September* 1870.

Omrao Thakoor (Plaintiff) *Appellant,*

versus

Gocool Mundul and another (two of the Defendants) *Respondents.*

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Baboo Tarucknath Sein for Appellant.
No one for Respondents.

A Moonsiff's order granting a review without proof that the new evidence tendered was not available before was held to be illegal, as well as the decision of the Lower Appellate Court confirming that order.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed.

The ground pressed upon us is that the first Court admitted a review without complying with the provisions of Section 376 Act VIII of 1859, in respect of being satisfied that the new evidence on which the application was admitted was not within the petitioner's knowledge or could not be adduced by him at the time when the decree was passed, and the Lower Appellate Court has acted illegally in confirming the judgment of the first Court passed on that review.

The first order passed by the Moonsiff on the application for review was that it should be put up with the record. With that application no new evidence was tendered, but it was subsequently. Now, no deposition or affidavit was taken from the defendant or from any one representing him or with knowledge of the facts. No enquiry was made by the Moonsiff as to whether the new evidence tendered was not available before the decision of the case. The application for review was admitted by the Moonsiff without a due regard to these provisions of the law, and the former judgment which was in favor of the special appellant reversed on such review.

The Lower Appellate Court has affirmed the judgment of the Moonsiff without meeting the objection specifically taken by the special appellant, *viz.*, that it was requisite under the law that proof should be given that the new evidence tendered was not available before.

The following cases have been cited by the special appellant in support of his contention that the judgments of the Lower Appellate Courts are erroneous in respect of the above particulars :—Weekly Reporter, Volume II, page 174 ; Weekly Reporter, Volume X, page 432 ; Weekly Reporter, Volume XII, page 536 ; Weekly Reporter, Volume XIV, page 26 ; and we think that the decisions cited support the contention. No one appears on the other side to contest the special appeal, and under the circumstances,—looking specially to the terms of Section 376 which clearly prescribe that a party tendering new evidence as a ground of review should shew that the new evidence "was not within his knowledge or "could not be adduced by him at the time "when the decree was passed," and to the fact that there is no proof of the above particulars in the present case,—we think that the order passed by the Moonsiff admitting the review was illegal, and the decision of the Lower Appellate Court confirming that order equally so.

In this view, we reverse the judgments of the lower Courts and decree this appeal with all costs.

The 1st June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Contribution—Use and occupation.

Case No. 192 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 29th August 1870, *reversing a decision of the Moonsiff of that District, dated the 24th February* 1870.

Gudadhur Chowdhry (Plaintiff) *Appellant,*

versus

Shama Churn Mitter (one of the Defendants) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.
Baboo Issur Chunder Chuckerbutty for Respondent.

The land of a jote jumma belonging to plaintiff and one *D* having been attached in satisfaction of a joint decree for arrears of rent, plaintiff deposited the entire amount of the decree. He then sued *M*, who had obtained *D's* share of the jote, for contribution on the ground that *M* was in use and occupation :

Held that the case against *M* was not met by the plea that he was not a party to the suit in which the decree was obtained.

Bayley, J.—We think in this case the judgment of the Lower Appellate Court must be reversed, and the judgment of the Moonsiff affirmed, with this exception that the decree should in the first instance go against the defendant, Shama Churn Mitter, and not as a lien against the jote, which the Moonsiff directs.

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The plaintiff sued for contribution on the ground that Shama Churn was the party in use and occupation of the jote.

Shama Churn, as defendant, did not traverse or deny these allegations made in the plaint, but only said that, as he was not a party to the suit in which the decree was obtained, he was not liable for contribution.

The first Court summoned Shama Churn to appear and depose as the person best knowing if, and for how long, he was in use and occupation ; but as Shama Churn did not appear, the first Court, upon the evidence in the case, as also under the provisions of Section 170 Act VIII of 1859, gave the plaintiff a decree against him.

The Lower Appellate Court has reversed that decision without really touching the main point in the case. It is quite true that for the purposes of the decree in the suit for arrears of rent, Joy Soonduree was the party against whom and in whose presence the decree was passed, and so far as the question of that decree for rent went, Shama Churn is right in saying that he was no party to the decree. That however does not meet the case against him now before us. The plaintiff's allegation was that granting Shama Churn was no party to the suit in which the decree for arrears of rent was obtained, yet this was not a suit for arrears of rent, but for contribution of the quota due from a party in use and occupation, and Shama Churn does not as a matter of fact deny that he was in use and occupation. It is this point which the Lower Appellate Court should have carefully adjudicated, and it has erred in law in not doing so.

With the exception, therefore, of that portion of the decree of the Moonsiff, where he says that it should in the first instance go against the jote as under a lien, and not against Shama Churn and other defendants, we think the decision of the Moonsiff should be restored and affirmed and the decision of the Lower Appellate Court reversed with all costs.

The 2nd June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Butwarrah—Co-sharers—Right of suit.

Case No. 2695 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 17th September 1870, *affirming a decision of the Subordinate Judge of Chumparun, dated the 19th March* 1870.

Khedoo Thakoor and another (two of the Defendants) *Appellants,*

versus

Bhugwut Lall and others (Plaintiffs) and others (Defendants) *Respondents.*

Mr. R. E. Twidale and *Baboo Boodh Sein Singh* for Appellants.

Baboos Chunder Madhub Ghose and *Debendro Narain Bose* for Respondents.

Where the Collector directs that a separate account should be opened with the sharer of an estate on his application, and his share is found not to be such as he states it to be, the co-sharers are at liberty to bring a suit in the Civil Court to establish the extent of their shares, in the event of the Collector under the Butwarrah law rejecting their application for a division of their specific shares.

Kemp, J.—We have no doubt whatever in this case that the decisions of the lower Courts, the decision of the Subordinate Judge in particular which is a very careful and well-considered one, are just and proper decisions.

The grounds taken in special appeal are,—first, that the suit of the plaintiff being to set aside on auction sale held for the recovery of arrears of Government revenue the suit ought to have been brought within one year. The next point taken is that

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Bujrungee Lall having obtained an order from the Collector under Section 10, Act XI of 1859, to open a separate account with reference to a 3 annas 4 gundahs share of the property without objection on the part of the plaintiffs, therefore the plaintiffs' suit is not cognizable by the Civil Courts, they not having objected to the proceedings under the aforesaid Section. The third point taken is that the decision of 1849 referred to by the Judge does not decide that Nurkoo Roy's share was 11 gundahs and not 3 annas 4 gundahs; and the last point is that even supposing that that decision does decide the point, the special appellant being an auction purchaser at a sale for arrears of Government revenue is not bound by that decision.

The first point, we think, is clearly untenable. The suit is not to set aside a sale, but to set aside an order of the Collector passed under the Butwarrah law, Regulation XIV of 1819, and to establish the share of the plaintiffs in the estate. Therefore the first point is overruled.

On the second point, namely, with reference to Section 10, Act XI of 1859, the decision of a Bench of this Court* published in Sevestre's Reports, Part 6, Volume XI, p. 311, has been quoted. That decision does not refer to Section 10, Act XI of 1859. Moreover what that decision lays down is that if a Collector's proceedings are without jurisdiction, then a suit in the Civil Court will lie. Act XI of 1859, according to the preamble of the Act, was passed amongst other reasons for the reason that it was expedient to afford sharers in estates who duly pay their shares of the sudder jumma easy means of protecting their shares from sale by reason of the default of their co-sharers. Now, Bujrungee Lall, who represented the rights and interests of Nurkoo Roy, made an application stating that the share of Nurkoo Roy was 3 annas 4 gundahs. The Collector under Section 10 directed that a separate account be opened with the applicant, that is, with Bujrungee Lall. There is nothing in the Section which enacts that if the share of the applicant shall not be such as he states it to be, the co-sharers shall not be able to bring a suit in the Civil Court to establish the extent of their shares, in the event of the Collector, under the Butwarrah law, rejecting their application for a division of their specific shares.

15 W. R., p. 112.

With reference to the 3rd point taken, a decision has been read to us, and in that case the contention between the parties was on the one side that Tirbhoowun had acquired the property in dispute from his self-acquired funds, and on the other side that Tirbhoowun and his brothers were joint, and therefore that the nephew of Tirbhoowun who was the plaintiff in that suit was entitled to a moiety of the property, and it was found that the whole of the property then in dispute had been acquired by Tirbhoowun from his own funds, and that he during his lifetime had made a disposition of the property whereby it was divided amongst his sons and nephews in equal shares, and the decree was that they were entitled to ⅛th of the property in dispute, that is to say, to 11 gundahs each.

On the last point, we think it very clear that what the defendant acquired by purchase at the revenue sale was the share of Nurkoo Roy, and that share having been found to be 11 gundahs and not 3 annas 4 gundahs, we confirm the decisions of the lower Courts and dismiss this appeal with costs.

The 2nd June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Ijmalee lands—Co-parcener's rights and remedies.

Case No. 189 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 10th November 1870, reversing a decision of the Moonsiff of that District, dated the 23rd January 1869.

Dwarkanath Bhooeah and others (Plaintiffs) *Appellants,*

versus

Gopeenath Bhooeah (Defendant) *Respondent.*

Baboos Doorga Mohun Dass and *Bungshee Dhur Sein* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

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A co-parcener in respect of ijmalee land is entitled to the use of every part thereof; and if by erecting a building he takes possession of more land than he would be entitled to on a partition, the proper remedy is to sue for a division of the land, and not for a demolition of the building.

Mitter, J.—We are of opinion that the Subordinate Judge has committed several errors in law in the investigation of the case so far as plot No. 2 is concerned. In the first place, he is quite wrong in assuming that the deed of partition of 1254 was executed between the ancestors of the parties to this litigation. It appears that that deed was executed between the father of the plaintiff on the one side and his uncles on the other, and after a careful perusal of it we find that it has no bearing whatever upon the land which is now in dispute. In the second place, the Subordinate Judge has rejected certain entries made in the resumption chittahs of 1839 as interpolations. The first Court sent for the originals of those chittahs from the Collectorate, and after comparing those originals with the copies filed on the record, came to the conclusion that there were no interpolations whatever. The Lower Appellate Court ought to have, under such circumstances, examined the originals of those documents before it came to the conclusion that the entries objected to by the respondent were interpolations. In the third place, the Subordinate Judge appears to have laid considerable stress upon a resumption proceeding No. 55 bearing date the 12th December 1839. There is nothing whatever in this proceeding or in any other document on the record to show that the land now in dispute was included in the claim for resumption which was brought by Government on that occasion. It is admitted on both sides that that land is covered by the sunnud No. 13123, and we find it distinctly recorded in the resumption proceeding above referred to that out of the lands covered by that sunnud only two plots, one called Tatooleah Pooshkurnee and the other *Jalkinarah* or banks of that Pooshkurnee, were in dispute before the resumption authorities. It is also admitted on both sides that the land now under litigation has nothing whatever to do either with the *Tatooleah Pooshkurnee* or its banks. It is clear, therefore, that the Subordinate Judge is wrong in relying upon this resumption proceeding as showing conclusively, as he observes, that the ancestors of the plaintiff had lost their possession over the disputed land 35 years previous to the institution of the present suit. It is true that the Subordinate Judge has, towards the end of his judgment, observed that the possession of the defendant has been satisfactorily proved by the testimony of his witnesses. But we cannot help thinking that this conclusion has been arrived at on the strength of the observations made by him in the earlier part of his judgment, which observations, as we have already shown, are altogether founded upon mistake.

We, therefore, reverse the decision of the Subordinate Judge so far as plot No. 2 is concerned, and remand the case to him with directions to re-try it with reference to the evidence on the record.

We wish to observe, however, that the plaintiffs' claim for the demolition of the building erected by the defendant on the land covered by plot No. 2 cannot be maintained. Even if the land be found to be ijmalee the defendant was clearly entitled as a co-parcener to use every inch of that land; and if by erecting the building in question he has taken possession of more land than he would be entitled to on a partition, the proper course for the plaintiff to adopt would be to sue for a division of the lands, and not to ask the Court for the demolition of the building. The decision of the Subordinate Judge with regard to plot No. 1, in respect of which no question has been raised before us, will stand.

The costs of this appeal will abide the ultimate result.

The 3rd June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Attaching creditors — Section 270, Code of Civil Procedure—Right of suit—Jurisdiction.

Case No. 96 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 16th February 1870.

Wooma Moyee Burmonya (Plaintiff) *Appellant*,

versus

Ram Buksh Chetlangee and others (Defendants) *Respondents*.

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Baboos Romesh Chunder Mitter, Rash Beharee Ghose and *Umbika Churn Banerjee* for Appellant.

Baboos Grish Chunder Mookerjee and *Kalee Prosunno Dutt* for Respondents.

A suit will lie by a prior attaching creditor to compel a decree-holder whose attachment is subsequent in date, to refund money obtained by him under an order of the Judge of a subordinate Court, in contravention of the provisions of Section 270, Code of Civil Procedure, but it must be a suit to set aside the Judge's order.

The Court having jurisdiction to adjudicate the conflicting claims of attaching creditors is the Court in which the attached money is in deposit.

Norman, C. J.—THE plaintiff Wooma Moyee Burmonya, having obtained a decree for a share of certain property left by her father against Eshan Chunder Roy, Bonomalee Roy, Ruttunmalee Roy and others, took out execution of that decree in a proceeding which is referred to in the Subordinate Judge's decision, numbered 42 of 1860.

The original application has been lost. But in the absence of any evidence to the contrary, we think the presumption is that the application was in accordance with the provisions of Section 212. If so, it must have contained a specification of *the relief granted by the decree*, that is to say, the award of possession and *mesne profits* as well as the amount of the costs.

The plaintiff in execution of the decree obtained possession of her share in the estate, and realized the costs adjudged to her by the decree in a subsequent proceeding under the original application described as 192 of 1863.

Eshan Chunder Roy, Bonomalee, and Ruttunmalee having appealed to Her Majesty in Council, Government securities of the value of 4,000 rupees were deposited in the late Sudder Court as security for the costs of the appeal by Eshan Chunder and others through Bonomalee Roy. The appeal to Her Majesty in Council was struck off the file for want of prosecution on the 2nd of November 1863.

On the 30th of April 1864, the plaintiff filed a petition in the Court of the Judge of Nuddea, in which, after reciting that she had obtained a decree for the property *with mesne profits* and that Bonomalee Roy had deposited Government securities for rupees 4,000, that the appeal to Her Majesty in Council had been dismissed, and as *a large sum inclusive of wassilat* was due to her, she prayed that the Court would be pleased by means of a roobokaree to cause the Government securities deposited by Bonomalee to be attached and brought into the Court at Nuddea to pay the sum due to her. The Judge of Nuddea ordered that a roobokaree should be sent to the High Court for keeping the money under attachment.

The matter was brought before Mr. Justice Sumbhoonath Pundit, who called for a report from the accountant of the Court whether the Government securities named were really in Court; and on receiving the accountant's report, the learned Judge ordered that the Government securities should be kept under attachment, and that a report should be sent to the Judge of Nuddea for his information, which was accordingly done.

On the 30th of December 1864, the plaintiff brought in a tabular statement praying that the property mentioned in a schedule, including the Government securities now in question, might be brought to sale in satisfaction of her claim for mesne profits.

The defendants Ram Buksh Chetlangee and Ramdhun Chetlangee obtained a decree in the Court of the Principal Sudder Ameen of Nuddea against Bonomalee Roy, in execution of which an order for the attachment of the Government securities for rupees 4,000 was issued on the 18th of December 1865.

Brojo Nath Koondoo subsequently obtained an order for the attachment of the same securities under a decree against Eshan Chunder Roy.

In March 1866, Wooma Moyee presented a petition to the Judge of Nuddea setting forth that Ram Ruttun Banerjee and others had preferred a claim to the Government securities for rupees 4,000 alleging that they had purchased the same from Ruttunmalee Roy, and that the claim was then pending before the Court and prayed that the said Government securities and interest should be brought into the Court at Nuddea and made over to her to satisfy her decree.

On the 23rd of March 1866, the Judge ordered that if the statement in the petition were true, a roobokaree should be sent to the High Court.

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This seems to have been done, and on the 10th of April an order was made by Mr. Justice Louis S. Jackson that the Judge should be informed that the papers were already under attachment at the instance of the Principal Sudder Ameen in the suit of Brojo Nath Koondoo.

Wooma Moyee Burmonya then presented another petition to the High Court alleging that her attachment of the 24th of June 1864 was the first attachment, and praying that the securities for rupees 4,000 should be transmitted to the Judge of Nuddea notwithstanding the order of the 10th of April 1866. Upon this petition, an order was made by Mr. Justice Louis S. Jackson on the 16th July 1866 that the Government securities for rupees 4,000 should be transmitted to the Judge of Nuddea, and that the said Judge should call up from the Court of the Principal Sudder Ameen the case pending in execution in that Court and should pass such orders as might be necessary with reference to the conflicting claims of the parties.

On the 27th of March 1867, the Judge of Nuddea, Mr. MacDonell, after hearing the claims of the three several parties decided that Ram Buksh and Ramdhun Chetlangee were entitled to preference.

He treated the attachment of Wooma Moyee Burmonya as having been made in what he calls the execution case No. 192 of 1863, and assumes that the attachment was only for the amount of the personal property, principal interest and costs, and not for the wassilat awarded to Wooma Moyee by the decree of the late Sudder Court. The Judge says that the principal interest and costs under the decree being satisfied a re-attachment was necessary, and accordingly he directed the Government securities to be made over to the second attaching creditors Ram Buksh Chetlangee and Ramdhun Chetlangee.

Wooma Moyee having brought this suit to recover the value of Government securities so made over, the Subordinate Judge took a similar view of the case, and on that ground as well as on the ground that the suit was barred by limitation, dismissed her suit with costs.

From that decision the present appeal is presented.

The point with which we have to deal is that of limitation.

The decision of the Judge of Nuddea in favor of the defendants Ram Buksh and Ramdhun Chetlangee bears date the 30th of March 1867. The papers were sold under an order of the 10th of April in that year. The present suit was instituted on the 2nd of April 1869.

The question is whether the suit falls within the provisions of Clause 5 Section 1 Act XIV of 1859, which gives a period of one year from the final decision or order in suits to set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, where such suit is maintainable.

The question which arose and which was determined by the Judge of Nuddea was which of the several attaching parties was entitled to be first paid as being the person on whose application such property was first attached ? The Judge decided that the present plaintiff's attachment was inoperative, that the decree in respect of which she had attached the paper had been satisfied.

No doubt a suit will lie by a prior attaching creditor to compel a decree-holder whose attachment is subsequent in date to refund money obtained by him under an order of the Judge of a subordinate Court in contravention of the provisions of Section 270, upon the principle stated by Sir Barnes Peacock in delivering the judgment of the Full Bench in Gogaram *versus* Kartick Chunder Singh, IX Weekly Reporter, pp. 514, 516. But as there pointed out, the suit must be a suit to set aside the Judge's order ; because as that order is an adjudication in a matter in which a Judge executing a decree has jurisdiction it must be treated as binding until it is set aside.

But the appellant's vakeel contended that under the provisions of Section 237, the High Court, being the Court in which the security was in deposit, and not the Judge of Nuddea, was alone competent to determine which of the several attaching creditors was entitled to priority.

If we could assume that the Judge of Nuddea had no jurisdiction his order would bind no one, and it would not be necessary to sue to set it aside.

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The Court which is to adjudicate between the conflicting claims is the Court in which the money *is in deposit.* Now we find that long prior to the 27th of March the Government securities had been, on the application of the plaintiff in the present suit, transferred to, and at the time of the adjudication by the Judge were in deposit in, the Judge's Court.

It seems, therefore, impossible to say that the Judge of Nuddea had no jurisdiction.

That being so, we think we are bound to say that the Subordinate Judge was right in holding that the present suit is barred by limitation, having been brought more than twelve months after the date of the Judge's order of the 27th of March. We regret this because we are not disposed to agree with the view which the Judge has taken of the rights of the parties.

The appeal will be dismissed with costs.

The 5th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Defaulting purchaser—Re-sale—Sections 253 and 254, Act VIII of 1859.

Case No. 104 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 6th January 1871, *reversing an order of the Subordinate Judge of that District, dated the 2nd September* 1870.

Bisokha Moyee Chowdhrain and others (Decree-holders) *Appellants,*

versus

Sonatun Doss (first Auction-Purchaser) *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Mohinee Mohun Roy and *Doorga Mohun Doss* for Respondent.

A purchaser at an execution sale having defaulted to pay in the purchase-money, the property was ordered to be re-sold. Before, however, the re-sale took place, another sale of the same property was effected at the instance of another judgment-creditor, but at a lower price than on the first occasion.

HELD that there was no re-sale such as is contemplated in Sections 253 and 254, Act VIII of 1859, and that the first purchaser was not liable for the difference between his bid and the price obtained at the second sale.

Jackson, J.—WE think we ought not to interfere in this case.

As regards the jurisdiction of the Judge which is objected to, there seems to be more than one decision of this Court in which it has been held that the Judge has jurisdiction in cases exactly similar to this. If I was satisfied that the order of the first Court was quite correct and that the order of the Judge was wrong, perhaps it might have been necessary, as it has been specially put to us, to consider and to give our opinion whether in a case of this description an appeal to the Judge would lie. But I think it is not necessary in this case to give an opinion, inasmuch as even if I was of opinion that the Judge had no jurisdiction to hear the appeal, I certainly would have exercised our extraordinary jurisdiction to put the first Court right upon a point on which it is evidently wrong. The Judge has passed an order setting the first Court right upon that point, and there are many decisions of this Court upholding the Judge's power to pass such an order. I think it is not necessary in this case to consider the question of his jurisdiction.

On the other point, namely, whether the first Court was right in requiring the former purchaser to pay up the difference between the bids in the first sale and the second sale, I have no doubt whatever that the decision of the first Court was wrong and that the decision of the Judge was correct. The question has reference to the provisions of Sections 253 and 254 of Act VIII of 1859. One Sonatun Doss having made a purchase defaulted to pay in the purchase-money. Thereupon, it was ordered that there should be a re-sale of the property. Before, however, this re-sale took place, another sale of the same property took place at the instance of another judgment-creditor, and the price obtained was a lower price than that at which the defaulting purchaser had effected his purchase. The first Court held that under these circumstances the defaulting purchaser was liable for the balance. The Sections of

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the Act in question evidently refer to a re-sale after due notification. There was in this case no such re-sale as contemplated by these Sections. The provisions of these Sections are penal, and therefore they must be construed somewhat strictly. Under the circumstances of the case, the first purchaser would not be liable for the balance between his bid and the price obtained in the second sale.

We, therefore, dismiss this appeal with costs, two gold mohurs being allowed for pleader's fees.

Mookerjee, J.—I am also of the same opinion. There was in fact no re-sale of the property as contemplated in Sections 253 and 254 of Act VIII of 1859, though one was certainly ordered.

The first sale was in execution of a decree obtained by one Sonatun Doss. At this sale, the decree-holder himself was the purchaser. He defaulted to pay the amount required to be deposited under Section 253; the property therefore should have been forthwith again put up and sold. This was not done, but an order only was passed for the re-sale of it. Before, however, the re-sale did take place after the issue of a fresh notification under Section 255, another decree-holder, who had also attached this property in execution of a separate decree obtained by him, applied for the sale of it for the satisfaction of his decree, and it was sold.

It appears that the proceeds of this sale was less than the price bid at the sale in execution of Sonatun's decree; whereupon, other decree-holders at whose instance none of the previous sales had taken place moved the Court to levy the difference of the two bids from the purchaser Sonatun, and the Moonsiff proceeded to levy it. I am clearly of opinion that the Moonsiff was wrong and that Sonatun, the first purchaser, was not liable to make good the difference, which was not a difference at a re-sale of the property as no re-sale had, as a matter of fact or law, taken place.

There are several decisions of this Court which have held that the defaulting purchaser and the decree-holder are to be considered to be parties to the suit within the meaning of Section 11 of Act XIII of 1861, so as to give a right of appeal—one is reported in VI Weekly Reporter, page 126, Miscellaneous Rulings, and another in III Weekly Reporter, page 3.

Even if the right of appeal to the Judge is doubtful, we certainly have the power under the Charter to set the Moonsiff right and to declare his order to be illegal and to have been passed without jurisdiction.

On the appeal of Bisokha Moyee who was not the decree-holder at whose instance the property was sold, we cannot interfere with the order passed by the Judge. I would, therefore, dismiss her appeal with costs.

The 5th June 1871.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Appellate Courts—Procedure—Remands.

Case No. 205 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 22nd December 1870, reversing a decision of the Moonsiff of Nattore, dated the 31st March 1870.

Krishnendro Roy Chowdhry (one of the Defendants) *Appellant,*

versus

Digumburee Debia Chowdhrain and others (Plaintiffs) *Respondents.*

Messrs. J. W. B. Money and *J. S. Rochfort* and *Baboo Bhyrub Chunder Banerjee* for Appellant.

Baboos Kalee Mohun Dass and *Mohinee Mohun Roy* for Respondents.

It is not obligatory on an Appellate Court to meet categorically every one of the arguments advanced by the first Court in support of its decision.

The meagreness of the judgment of a Lower Appellate Court can only warrant a remand when the judgment does not show that the Court has considered the evidence.

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Mitter, J.—I AM of opinion that there is no ground whatever for this special appeal.

The cases noted in the margin* which have been cited to us by the learned Counsel, Mr. Money, do not appear to me to have any bearing upon the case now under our consideration. It is quite clear that the Subordinate Judge has dealt with all the material points involved in this case, and the long and elaborate judgment recorded by him on each and every one of those points renders it impossible for us to say that the conclusion he has arrived at is not based upon a due consideration of the whole evidence on the record, and of all the probabilities arising from it. It is true, the Subordinate Judge has not taken notice of every item of evidence produced by the parties, and it also appears that he has not categorically met every one of the arguments advanced by the first Court in support of its decision. But there is no law that I am aware of which renders it obligatory on an Appellate Court to do so, and I cannot therefore interfere with the decision of the Subordinate Judge upon such a ground of special appeal when I am by no means satisfied that he has failed to take into consideration any thing that ought to have been considered by him.

* Special Appeal No. 425 of 1862. Special Appeal No. 2538 of 1862. Special Appeal No. 1064 of 1865. Weekly Reporter, Volume III, page 176.

Much stress has been laid upon the fact that the Subordinate Judge has drawn an unfavorable inference against the truth of the special appellant's case from the refusal of the special appellant to appear as a witness in the Court of first instance when he was summoned by that Court to do so. It has been strongly argued that a person standing in the position of the defendant has a prejudice to appear as a witness in a Court of Justice. I do not wish for one moment to interfere with the honest prejudices of parties, however erroneous those prejudices might be. But I cannot allow those prejudices to interfere with the due administration of justice. When parties who, upon their own showing, appear to have the best knowledge of the facts connected with their case refuse to give their own evidence after being duly summoned by the Court to do so, they have no right whatever to complain if the Court refuses to believe the testimony of their menials and dependants.

It has been further argued that the first Court having condoned the conduct of the special appellant, the Lower Appellate Court was wrong in relying upon that conduct in support of his decision. I do not see, however, that the Lower Appellate Court has committed any error in law in doing so. If the Lower Appellate Court had decided the case *ex-parte* against the defendant, special appellant, on the ground of his refusal to appear as a witness in the Court of first instance, this contention might have stood on a different footing. But all that the Lower Appellate Court appears to have done is to take the whole evidence produced on the record in conjunction with the refusal of the special appellant to give his own evidence, and I think that it was fully justified in adopting this course.

For the above reasons, I would reject this special appeal with costs.

Ainslie, J.—I only wish to add this remark to those of my learned colleague,—that the case last cited by Mr. Money, which is to be found in Weekly Reporter, Volume III, page 176, was not remanded on the ground that the Subordinate Judge had failed to meet the arguments of the first Court. The grounds of remand were that there were some mis-statements of facts in the judgment of the lower Court, and the Judges of this Court thought it possible that those mistakes might have had a material effect on the decision of the lower Court. They therefore remanded the case to the lower Court for a fresh trial. They then continued :—" We think the Principal Sudder Ameen should enter into the case and record his reasons for arriving at his conclusions ; " that is to say, having first remanded the case, they pointed out to the Principal Sudder Ameen that it would be desirable that he should give his own reasons and arguments for the conclusions that he arrives at. They did not, however, make this the ground of remand, and for my own part I entertain great doubts whether the meagreness of a judgment warrants this Court in remanding a suit for re-trial. Even if it do so in any case, I conceive that it can only be when there is nothing in the judgment of the Lower Appellate Court to show that it has considered the evidence.

In the present case, however, the Subordinate Judge has evidently looked into the whole of the evidence, although he has not recorded the whole of it in detail in his judgment.

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The 5th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Reviews—Section 103 Act VIII (B. C.) 1869—Re-hearing—Section 119, Civil Procedure Code.

Case No. 99 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 19th December 1870, *affirming an order of the Moonsiff of Muksoodpore, dated the* 31*st August* 1870.

Durpo Monee Gooptea (Judgment-debtor) *Appellant,*

versus

Tara Churn Sein (Decree-holder) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

No one for Respondent.

Section 103 Act VIII (B. C.) of 1869 applies only to reviews, and not to applications for a re-hearing where decisions have been passed *ex-parte.* Cases of the latter description are governed, under Section 34, by Section 119 Act VIII of 1859.

Jackson, J.—We differ from the Judge in the view he has taken of the provisions of Act VIII of 1869, B. C. Section 103 of that Act applies to applications "for a "review of any judgment or order passed "in any suit brought under the provisions "of this Act." It does not apply to applications for a re-hearing of a suit which has been decided *ex-parte* against the defendant. Sections referring to re-hearing of *ex-parte* decisions and to review of judgment, both in Act VIII of 1859 and also in Act X of 1859, were distinct and separate. Section 103 Act VIII of 1869, B. C., applies only to reviews; and Section 119 of Act VIII of 1859 will, under the provisions of Section 34 of Act VIII of 1869, B. C., apply to applications for a re-hearing in cases in which decisions have been passed *ex-parte.*

We remand this case to the Judge to be returned to the first Court for a fresh trial.

Costs will abide the result.

Mookerjee, J.—In this case, the Courts below are evidently wrong in the view they have taken of the law, Act VIII of 1869, B. C. The plaintiffs instituted this suit on the 23rd of May 1870 for arrears of rent in the Court of the Moonsiff under the provisions of Act VIII of 1869, B. C. An *ex-parte* decree was passed in their favor on the 6th June following. Plaintiff then sued out execution of this decree and attached certain properties belonging to the judgment-debtor on the 10th Srabun 1277. On the 25th Srabun, which corresponds to the 13th August 1870, the defendant filed a petition in the Court under Section 119 of the Procedure Code, praying to set aside the *ex-parte* decision passed against him on the ground that he had no notice either of the suit or the decree. This application, it is admitted, was made within 30 days after a process of attachment was executed by the decree-holder to enforce the *ex-parte* judgment. The Moonsiff was, therefore, bound to proceed under the provisions of this Section and determine whether the summons was or was not duly served on the applicant. Instead of doing so, the Moonsiff states that inasmuch as there is no distinct provision in Act VIII of 1869, B. C., like the provisions of Section 58 of Act X of 1859, or of Section 119 of Act VIII of 1859, he cannot allow this application. He holds that the only Section in this law of the Bengal Council which provides for an application for a re-hearing or re-consideration of a judgment passed under it, is Section 103 of that Act which requires that no petitions for a review of a judgment or order passed in any suit under the provisions of this Act shall be received after the expiration of thirty days from the date of such order or judgment.

The Moonsiff, therefore, was of opinion that the application of the judgment-debtor was beyond time, having been preferred 30 days after the date of the judgment, which was passed in this case on the 6th of June 1870.

The Judge also appears to have fallen into the same mistake. Both the Courts seem to me to have lost sight of Section 34 of Act VIII of 1869 or to have misapprehended its provisions. Section 34 lays down that "save as in this Act is otherwise provided, suits of every description "brought for any cause of action arising

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" under this Act and all proceedings there-
" in, shall be regulated by the Code of
" Civil Procedure passed by the Governor-
" General in Council being Act No. VIII
" of 1859," &c., &c.

In the Act of the Bengal Council there is no provison separately made for applications to set aside *ex-parte* decisions passed by the Court, but yet it is clear that such decision must be set aside when it is proved that the summons had not been duly served on the defendant as required by law, for a Civil Court will not receive an appeal from a judgment passed *ex-parte* against a defendant who has not appeared or from a judgment passed against a plaintiff by default for non-appearance, unless there was an application, though unsuccessful, under the provisions of Section 119 of the Procedure Code.

It is, therefore, obvious that the Legislature clearly intended that the procedure on applications to set aside *ex-parte* judgments should be the same as is provided for by Section 119 of Act VIII of 1859.

By Section 34 of the aforesaid Act of the Bengal Council a clear provision is made to the effect that, where the Act does not otherwise provide, all suits brought under Act VIII of 1869 shall be regulated by the Code of Civil Procedure and " that all the provisions of that Act" shall apply.

There is little doubt, however, that Section 103 of Act VIII of 1869, B. C., applies merely to applications for review of judgment and not to applications to set aside *ex-parte* decisions. The Legislature, being of opinion that the procedure laid down in Act VIII of 1859 should not be made applicable to applications for review preferred in cases decided under the provisions of Act VIII of 1869, B. C., made a separate provison by enacting Section 103, which limits the period within which such applications should be made to 30 days, instead of 90 days as provided for in Section 377 of the Civil Procedure Code. In cases where a review is applied for of a judgment passed under the Act of 1869, the Civil Court must follow Section 103 of that Act, and not Section 376 or 377 of Act VIII of 1859, because a different procedure is made by the Bengal Act, and under Section 34 that procedure must be followed.

I would, therefore, remand this case to the Court of the Moonsiff for an inquiry and adjudication of the application made by the defendant under the provisions of Section 119 of the Civil Procedure Code. The costs of his appeal, which we assess at 2 gold mohurs, will abide the final result of this litigation.

The 6th June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Reversioner—Cause of action.

Case No. 290 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 14*th December* 1870, *reversing a decision of the Moonsiff of Tegrah, dated the* 18*th May* 1870.

Sooruj Bunsee Koonwar (one of the Defendants) *Appellant,*

versus

Moheeput Singh (Plaintiff) *Respondent.*

Mr. C. Gregory and *Doorga Doss Dutt* for Appellant.

Baboo Nil Madhub Sein for Respondent.

The mere execution and registration of a deed as between strangers, without any ulterior act directed against a Hindoo widow in possession, or against the reversionary heir or his possession, cannot give the latter any cause of action or entitle him to ask for a declaratory decree.

Bayley, J.—In this case, we think that the first and second grounds of special appeal must prevail. The facts are briefly these :—The plaintiff comes in as the reversioner of the widow of one Nund Lall, the son of Sheoburn Lall. He sued for the declaration of his title by setting aside a kobala dated the 25th March 1867 from one Mussamut Champa Koonwar, daughter of Reetburn Sahee, and others, propounded by the defendant. The plaintiff does not sue for confirmation of possession ; on the contrary, his allegation is that his possession is undisturbed. It is also a fact that the widow of Nund Lall, the tenant for life, is in possession. The suit is not brought to set aside any alienation made by her, or

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any direct act of waste or injury to the property which might affect the rights of the plaintiff as the widow's reversioner. What is pressed upon us by the respondent is that although the name of Reetburn was used as that of the recorded proprietor of the property and his widow executed the deed to defendants set up by them, still the real proprietor was Sheoburn, the father of Nund Lall, whose widow is the tenant for life; in other words, that the act of Reetburn's widow must be deemed no legal act as the property was not Reetburn's at all, but Sheoburn's only. Now the late Chief Justice, in a case reported at Hay's Reports, Volume II, page 608, held that a reversioner ought to sue, not upon some contingent and uncertain right which may never accrue to him, but upon some positive right;—and further that was a case of alleged improper alienation by the widow herself. In the present case, however, it is not pretended that there was any such alienation or any waste by the widow affecting plaintiff as her reversioner. The mere execution of a deed or registration of it as between strangers without any ulterior act directed against the plaintiff or his possession, or against the widow and her possession, can in no way give the plaintiff a cause of action at this stage. It would be contrary to all judicial rules to express any further opinion in the case, as we are asked to do, at the present stage of the litigation and as the case at present stands before us. It must be left to the plaintiff when any real cause of action or reversionary right accrues to him to take such steps as he is then advised. As the case stands at present, we think the judgment of the Lower Appellate Court must be reversed, and the plaintiff's suit dismissed as brought without any existing cause of action and with all costs.

The 6th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervention—Section 73 Act VIII of 1859.

Case No. 2608 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 14*th September* 1870, *modifying a decision of the Subordinate Judge of that District, dated the* 21*st March* 1870.

Saligram Singh and another (Plaintiffs) *Appellants,*

versus

Gheenoo Singh and another (Defendants) *Respondents.*

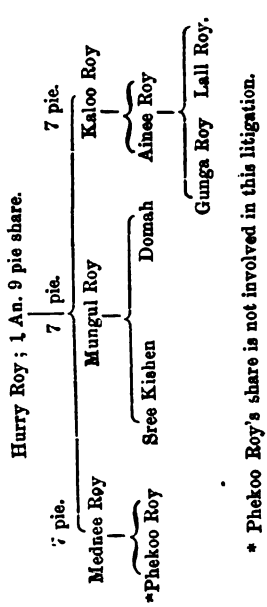
Baboos Romesh Chunder Mitter and *Bama Churn Banerjee* for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Plaintiffs, having succeeded in a suit for foreclosure of a mortgage, by a conditional bill of sale, of a share of two mouzahs, then sued for possession and registration of names as proprietors. Whilst this suit was pending, certain parties intervened and asked to be made parties under Section 73, Code of Civil Procedure, on the ground that plaintiffs' vendors were not entitled to the full share claimed as they themselves had purchased a portion thereof.

HELD that the Court exercised a wise and proper discretion in allowing the intervenors to be made parties, for a decree in plaintiffs' favor, though not legally binding on them, would, nevertheless have caused them great difficulty in all matters of rent.

Glover, J.—THE accompanying genealogical table will be of use in setting out the facts of this case.



The plaintiffs sue for possession of a 10½ pie share of mouzahs Meetapore and Punsa, mortgaged to them by a conditional bill of sale by Rackoo Roy and others (descendant of Mungul Roy and Kaloo Roy) in 1863. A foreclosure suit was brought after the year of grace, and plaintiffs now ask for possession and registration of names as proprietors.

The original defendants, that is the mortgagors, denied the mortgage, and raised various pleas relating thereto, into which it is not necessary for us to enter inasmuch as these defendants preferred no appeal against the first Court's decision upholding the conditional bill of sale.

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Whilst the suit was pending, however, the present special respondents intervened, and asked to be made parties under Section 73 of the Procedure Code, on the ground that the plaintiffs' vendors were not entitled to a 10½ pie share of the estate, but only to a 7 pie share. They claimed to have themselves purchased a 7 pie share from Sree Kishen Roy and Gunga Roy in 1270, which would only leave a 7 pie share for the plaintiffs.

The table given above shows that the original owner held a 1 anna 9 pie share. On his death the property admitttedly went to his three sons, Mednee, Mungul, and Kaloo, in shares of 7 pie each.

And here begins the divergence. Plaintiff says that Mungul had two sons, Sree Kishen and Domah, who succeeded to a 3½ pie share each, and that Ainee Roy, the son of Kaloo, had also two sons, Gunga and Lall Roy, who got each 3½ pies.

The defendants aver on the contrary that Mungul and Ainee had each only one son, —Sree Kishen in the one case and Gunga in the other,—and that these succeeded to a 7 pie share each, half of which or an aggregate of 7 pie they sold to the defendants; that they, defendants, are in possession of this share and pay the Government revenue on it.

The turning point of the case therefore was,—had Mungul and Ainee two sons each, or only one? If they had two, it is clear that the half of the son's shares would amount to 3½ pie only, and not 7 pie, and that the vendors of the plaintiffs would have had the share which they mortgaged to them.

The Subordinate Judge decided for the plaintiffs. But the Judge, on the appeal of the intervening defendants, held first that the plaintiffs had not proved their vendors' right to any thing more than a 7 pie share; and secondly, that the defendants had shown "by evidence, documentary and oral, that "they have all along been in possession of "the 7 pie share and have paid the Govern-"ment revenue thereon." The words used by the Judge "all along" refer to the date of the defendant's purchase, *viz.*, A. D. 1810. The Judge went fully into the documentary evidence adduced, and held that the plaintiffs had not established Domah Roy and Lall Roy's parentage. He gave them, therefore, a decree for a 7 pie share only.

They now appeal specially, urging—

(1.) That the intervening third parties ought not to have been made defendants under Section 73 Act VIII of 1859; that the Subordinate Judge had no power so to admit them, and that therefore his whole proceedings were void by reason of want of jurisdiction.

(2.) That, if they were rightly admitted as defendants, the onus should have been placed on them, and not on the plaintiffs; they being volunteers asking to be made parties, should have been made to prove their own title. And,—

(3.) That if the onus were on them, the Judge's decision shows clearly that they were unable to support it.

In support of the first objection (which we may observe was not the subject of appeal to the Judge), the special appellant's pleader relies on the ruling of this Court in the case of Joy Gobind Doss *versus* Gowree Pershad Shaha, VII Weekly Reporter, p. 202,—where it was laid down that no one claiming a title adverse to those set up by the plaintiff and defendant in a suit should intervene and be introduced into the suit, inasmuch as he would not be affected by the result of the suit.

This ruling, however, was much discussed in Kalee Pershad Singh *versus* Joy Narain Roy, XI Weekly Reporter, p. 361, one of the learned Judges (Mr. Justice L. S. Jackson) being one of those who had decided the case of Joy Gobind Doss, and its meaning explained. The order in that case was construed to mean that where a party claimed adversely to both plaintiff and defendant and was not a party to the suit, he could not in law be bound by the decision and would not be likely to be affected by the result. By "claiming adversely" was intended a claim to exclude the actual parties to the suit altogether from any share or interest in the subject-matter of the suit. It was also laid down that the law did not prohibit the decision of questions between rival defendants in all cases, and that Section 73 of the Procedure Code was intended to leave Courts a discretion in cases where intervenors apply to be made parties to a suit; and further that the words "persons who may be likely to be affected by the result" did not mean only "persons on whom the result was legally binding."

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We take this to be the explanation of the Court's judgment in Joy Gobind Doss' case, and we are quite willing to follow it, for it is easy to conceive many cases (especially in this country) where a third party, although not legally bound by a decision passed *inter alios* might be put to the greatest inconvenience, if not loss, by not being allowed to intervene under Section 73. In the present case, the suit was for a specific share of an undivided estate. If the present special respondent had not been allowed to appear, the result of a decree in plaintiff's favor would have been great difficulty in all matters of rent. The plaintiff, declared by a decree of Court to be the owner of a 10½ pie share of the estate, would have sued the ryots for that proportion of rent; and in every case the defendants, special respondents, who have been found to be the real owners of a portion of that share, would have been forced into Court and have been forcibly obliged to bring a regular suit to establish their right to collect their share of the rent. The decree itself would not have affected the special respondent, but the result of that decree would have done so most injuriously, and we think that the Court below exercised a very wise and proper discretion in allowing them to be made parties to the suit.

Then as to the onus. The decision in Jugdanund Misser *versus* Hamed Russool, X Weekly Reporter, p. 52, lays it down that an intervenor, claiming as against a plaintiff and being made a defendant under Section 73, has to support the ground of intervention and to prove his claim.

Now, in the present case, the Judge has found that the intervening defendants did prove their title to a 7 pie share of the property. He says :—" They (*i. e.* the intervening defendants) have shown by evidence, documentary and oral, that they have all along been in possession of the 7 pie share, and have paid Government revenue thereon."—If, therefore, the onus was on the defendants, it is clear that in the Judge's opinion they had been able to support it. And this disposes of the third ground of appeal as well as of the second.

We do not think it necessary to go in detail through the documentary evidence, or to dispose of the special appellant's objections as to the way in which the Judge has construed it; for quite apart from such considerations, the finding of the Court below would be fatal to the plaintiff's claim, inasmuch as the Judge has found that the defendants have been in possession of the share they claim, under an unchallenged title of more than 50 years. This length of possession would of itself give them an indefeasible title to the share as against the plaintiffs, even if they had not been found to have a good title in other ways.

The special appeal is dismissed with costs.

The 6th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Wassilat—Cultivator's claim.

Case No. 2724 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 22nd August 1870, *affirming a decision of the Subordinate Judge of that District, dated the 30th April* 1870.

Nursingh Roy and others (Plaintiffs) *Appellants,*

versus

Mr. John Anderson (Defendant) *Respondent.*

Baboos Bama Churn Banerjee and *Taruck Nath Pallit* for Appellants.

Mr. R. E. Twidale and *Baboo Sreenath Doss* for Respondent.

Where the party recovering possession of land of which he was wrongfully dispossessed, and claiming wassilat, is himself the cultivator, he is entitled to recover the profits which he would have made out of the land by the cultivation, had he not been dispossessed.

Kemp, J.—THE plaintiff is the special appellant. He appears to have obtained a decree for possession as against the defendant that possession being a wrongful one, and he also appears to have recovered mesne profits of the 12 annas kist of the year 1274. The present suit is brought for the remaining 4 annas kist of 1274 and for the years 1275 and 1276, the claim being rupees 3,629-2-9. The plaint states that the plaintiff was the cultivator of some 72

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beegahs for which he paid rent to his co-sharers; that they let out these 72 beegahs in ticca to the factory of which the defendant is the manager or proprietor; that on the termination of the lease the factory refused to give up possession; and that by their refusal and wrongful holding over of the land, the plaintiffs have been deprived of the profits which they would otherwise have made by their own cultivation of the lands. Both Courts appear not to have considered the frame of the plaint or the position of the plaintiffs. They appear to have blindly adhered to the ruling laid down in Volume IX, Weekly Reporter, (page 445) by the Full Bench, without considering whether that decision was applicable to the circumstances of the present case or not. Now, it is very clear that that case as well as the other cases that have been quoted proceed on the principle that the party claiming the wassilat is a party who is receiving rent, and not a party who is cultivating and enjoying the full profits of the land.

The decision quoted in Volume XIII, Weekly Reporter (page 37) by Justices L. S. Jackson and Markby appears to lay down the correct principle, and we may observe that Mr. Justice L. S. Jackson was one of the Judges who sat in the Full Bench case reported in Volume IX. In the case referred to in Volume XIII, the Judges lay down the rule that the Full Bench decision in Volume IX never intended to lay down the proposition of law that a man who was himself the cultivator was not to recover the profits which he would have made out of the land by his cultivation if he should be wrongfully dispossessed. The decision in Volume X, Weekly Reporter, page 463, quoted by Baboo Sreenath, appears *primâ facie* to be in his favour; but the circumstances of that case are not before us, and it appears also that in that case the plaintiff had certain lands which were in the cultivation and occupancy of ryots and that a portion of them only were the khas kamar lands of the plaintiff. In this case, the plaintiff states in his plaint that the whole area of 72 beegahs was in his own cultivation, and that he enjoyed the profits of the crops raised therein up to the date on which he leased the lands to the factory.

The case must therefore go back. The Lower Court will find in the first place whether the plaintiff did, as he alleges, cultivate these lands himself before he leased them to the factory; and if so, apply the principle laid down in the decision reported in Volume XIII, and decide what amount of mesne profits the plaintiff is entitled to recover.

Costs to follow the result.

The 7th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 246 Act VIII. 1859—Defective order—Limitation.

Case No. 7 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 31*st October* 1870, *reversing a decision of the Moonsiff of Naraingunge, dated the* 31*st March* 1870.

Jugobundhoo Bose (Plaintiff) *Appellant,*

versus

Sachya Bibee and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Sreenath Banerjee* for Appellant.

Baboo Doorga Mohun Dass for Respondents.

Where a claim is preferred under Section 246, Act VIII of 1859, and the Court simply releases the attached property without making any inquiry at all on the points specified in that Section, its order cannot be regarded as an order under the Section in question, and the rule of limitation there laid down does not apply to a regular suit subsequently brought by the decree-holder.

Mookerjee, J.—THE facts of this case are extremely simple. Plaintiff obtained a money-decree against one Mahomed Jahid and his wife Jetun Bibee. In execution the disputed property was attached for sale.

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One Sachya Bibee, the sister of the judgment-debtor Mahomed Jahid, preferred a claim to the property under Section 246 of Act VIII of 1859, on the ground that she had purchased the same from the debtor and was in possession thereof at the time when the property was attached. The officer before whom the claim was preferred, however, made no inquiry under the provisions of the aforesaid Section, but released the property from attachment on the 1st of November 1865. The decree-holder has instituted this suit on the 2nd October 1869 in order to obtain a declaration that the property belongs to the judgment-debtors, and that the kobalah and decree pleaded by the sister Sachya Bibee are fraudulent documents obtained for the purpose of concealing the property from the creditors of the judgment-debtors.

The defence raised the plea of limitation under Section 246. On the merits, the defendant contended that the kobalah was a *bonâ fide* document executed for valuable consideration. As regards the merits of the case there is no doubt whatever. Both the Courts have held that the kobalah is a colorable and benamee deed executed in fraud of creditors and that the judgment-debtors are really in possession, and not the defendant.

But in respect to the question of limitation, the first Court was of opinion that the provisions of Section 246 do not apply, and that the suit being one for the establishment of the right of the judgment-debtors could be brought within 12 years. The Moonsiff quotes a decision of a Division Bench of this Court reported in VIII Weekly Reporter, page 73, Rajah Bishen Prokash Narain, appellant, *versus* Baboon Misser (Kemp and Glover, J. J.)

The Subordinate Judge was, however, of a different opinion. He held that the suit is barred, not having been instituted within one year of the date of the order of the 1st of November 1865.

On special appeal, it is contended by Baboo Romesh Chunder Mitter that the suit is not barred, inasmuch as there has been no adjudication under the provisions of Section 246 of the Procedure Code; that the suit is not brought to set aside any order passed in the execution department; and that a suit like the present can be instituted at any time the decree-holder is informed and believes that there is property belonging to his debtor held and enjoyed by him in the name of another person, provided that the decree itself is not barred by want of prosecution for 3 years under Section 20 of Act XIV of 1859. For the respondent it was argued that the order of the 1st November 1865 was an order under Section 246, inasmuch as it appears that when the claim was preferred by his client an order was passed for the production of evidence, and that in all probability evidence was produced by his client to prove his possession. It is however admitted by Baboo Doorgah Mohun that if there had been no order made under the provisions of Section 246, the plaintiff would not be barred.

On referring to the record I find that the officer executing the decree had held no investigation whatsoever according to the directions enjoined by the provisions of Section 246 of Act VIII of 1859. That Section lays down that "in the event of any "claim being preferred to or objection offer-"ed against the sale of lands or any other "immoveable and moveable property which "may have been attached in execution of a "decree, &c., as not liable to be sold in exe-"cution of a decree against the defendant, the "Court shall proceed to investigate the same "with the like powers as if the claimant "had been originally made a defendant to "the suit," and "if it shall appear to the "satisfaction of the Court that the land or "other immoveable or moveable property was "not in the possession of the party against "whom execution is sought or some other "person in trust for him or in the occupancy "of ryots, &c., paying rent to him, at the "time that the property was attached, &c., "the Court shall pass an order for releasing "the said property from attachment." It also provides that if, on the other hand, it shall appear on this inquiry that the property was in possession of the party against whom the execution is sought as his own property, or was in the possession of some other person in trust for him, the Court shall disallow the objection. Then the Section says that "an order passed under *this* Section "shall not be subject to appeal, but the party "against whom the order may be given shall "be at liberty to bring a suit to establish "*his* right at any time within one year from the date of the order."

I find that the Court, when passing the order of the 1st of November 1865, had made no investigation and pronounced no decision as to whether the claimant was in possession

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on his own account or in trust for the judgment-debtors. There is literally no sort of inquiry as to who was in possession of the property at the time of the attachment. The kobalah under which the claimant based his title and possession was also not adduced, and as far as the record shows no witnesses were examined. The order, therefore, of the 1st November 1865 is not an order under Section 246, and I am consequently of opinion that the plaintiff was not bound to come into Court within one year from the date thereof.

The words "*the order which may be* "*passed by the Court under this Section*" appear to me to contemplate an order passed after an enquiry duly made under the provisions of this Section. That is, if the Court, after an investigation as to the fact of possession, should declare that the claimant was in possession on his own account, the decree-holder, if dissatisfied with this order, may contest the propriety and correctness of it by a suit within one year of the passing of it. But I apprehend that if a Court does not make any inquiry at all on the points enumerated in Section 246, but simply releases the property attached because a claim has been preferred, and "it is not "shown what particular portion of the "attached property is claimed by the claim-"ant,"—which appears to me to be the only reason given (if it can be said to be any reason at all) by the Moonsiff for passing the order of the 1st of November 1865,—the order is not an order under Section 246, but is a simple denial of the inquiry required to be made under this Section. It is quite clear to me that the Court in the execution case wholly failed in its duty and has not done what was required of it by the law. Such an order is not a legal order, for there is no adjudication of any matter in favor of the claimant which the decree-holder would be bound to set aside within the time prescribed by the last portion of the Section afore-quoted.

In this view of the law I am supported by a decision of Pundit and Campbell, J. J., in page 35 of IV Weekly Reporter; of the present Officiating Chief Justice Norman and Justice Seton-Karr in page 252 of VII Weekly Reporter; of another Division Bench reported in XI Weekly Reporter, page 134. There is also a decision on this point in III Madras High Court Reports, page 139. In another decision reported in page 73, VIII Weekly Reporter, the Judges distinctly held that even if the order was clearly one properly passed under Section 246 where every thing turns upon the fact of a *bonâ fide* possession, that still the decree-holder is not barred by the provisions of that Section from bringing a suit to establish the right of the judgment-debtor after the lapse of one year from the date of the order under Section 246. In a later decision, passed by a Division Bench of this Court and reported in XIV Weekly Reporter, page 367, the Judges refused to hold that the suit of the claimant was barred, inasmuch as they held that the order disallowing the objection under Section 246 was not an order under that Section, because "there "was no decision as to possession in the "order passed on the plaintiff's claim under "Section 246," Now without expressing any opinion whatever as to the construction of Section 246, *i. e.*, whether the limitation prescribed by it affects suits brought to establish the right of the judgment-debtor, which is a matter on which the Court in the execution case had passed no decision whatsoever, or whether the Section simply contemplates suits brought expressly to set aside an order under Section 246, contesting the decision on the point of *bonâ fide* possession only, I am of opinion that the rule of one year's limitation does not apply to the present case, and that therefore the suit is not barred.

Under this view of the law, it is not necessary to remand the case as both the Courts have held that the alleged purchase by Sachya Bibee, the sister of the judgment-debtor Mahomed Jahid, is a benamee and fraudulent one and that the property in dispute is the property of the judgment-debtor, and as such liable to sale in execution of the decree obtained by the plaintiff against Mahomed Jahid. I would, therefore, decree the appeal of the plaintiff with costs. The effect of the order will be that the judgment and decree of the first Court will stand and the appeal of the defendants to the Subordinate Judge will be dismissed.

Jackson, J.—I agree with my learned colleague that no decision was arrived at within the terms of Section 246 Act VIII of 1859 in the execution proceedings out of which this case arose, and that the limitation of Section 246 is therefore inapplicable to the plaintiff's suit. The plaintiff's claim will, therefore, be decreed with all costs, the decision of the first Court to that effect being restored.

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The 7th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application for execution—Copy of decree—Section 212 Act VIII. 1859—Section 15 Act XXIII of 1861.

Case No. 66 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 26th November 1870, *affirming an order of the Subordinate Judge of that District, dated the 9th August* 1870.

Modhoo Dossia (Decree-holder) *Appellant,*

versus

Nobin Chunder Roy (Judgment-debtor) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Oopendro Chunder Bose and *Rajendro Narain Bose* for Respondent.

It is not required by Section 212 of Act VIII of 1859 and Section 15 Act XXIII of 1861 that a copy of the decree should be filed when an application is made for execution.

Kemp, J.—THE decree in this case was passed on the 16th of December 1865. It appears that the decree-holder in May 1866 realized a portion of the amount due to him under the decree. Again in July 1866, he attached certain properties belonging to the judgment-debtor; in short, between 1865 and 1866 he was proceeding to enforce his decree by every means in his power. Again in 1867 he applied to execute his decree, but his application was rejected on the ground that the decree-holder had not filed a copy of the decree.

Both Courts have gone upon this ground that it is the duty of the decree-holder to file a copy of the decree of which execution is sought, and he not having done so they held that his claim was barred.

We think that under Section 212 of Act VIII of 1859 and Section 15 Act XXIII of 1861 the Courts below are wrong. The Sections referred to do not enact that the decree-holder must file copy of his decree. He is to file an application drawn up in a certain form, and he is to state the mode in which the assistance of the Court is required. Under Section 15 Act XXIII of 1861, if it be shewn to the Court that the particulars stated in the application which is required to be filed under Section 212 of Act VIII do not correspond with the original decree, the Court may either return the application for correction or cause the necessary alteration to be made after comparing the application with the original decree. The Judge has taken a wrong view of this case. We, therefore, reverse his order and decree the appeal with costs.

The decree-holder will be entitled to take out execution of his decree.

The 7th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Decree—Construction—Mesne profits—Sections 196 and 197, Act VIII of 1859.

Case No. 105 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 5th January 1871, *reversing an order of the Subordinate Judge of that District, dated the 31st August* 1870.

Raesoonissa Begum (Decree-holder) *Appellant,*

versus

Sharoda Soonduree Chowdhrain and others (Judgment-debtors) *Respondents.*

Baboos Sreenath Dass and *Grish Chunder Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee, Kally Mohun Dass and *Grija Sunkur Moojoomdar* for Respondents.

A decree of a Court should, under Sections 196 and 197, Act VIII of 1859, state whether mesne profits are awarded or not, and it should distinctly state when it reserves any points for subsequent enquiries in execution of the decree, what those points are.

A decree for possession was construed to include mesne profits where the High Court was satisfied that it was the intention of the Court which passed the decree to award mesne profits, even though the words "mesne profits" were not distinctly expressed.

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Jackson, J.—THIS is an appeal from an order of the Judge of Dacca passed in execution of decree. The suit was to recover possession of certain lands and for mesne profits for those lands during the time of dispossession. The suit appears to have been originally decreed so far back as the 3rd September 1862. But it was remanded on three occasions by the Judge, and was only finally decided on appeal to the High Court on the 4th January 1869. The result of this final appeal to the High Court was that the decision of the Principal Sudder Ameen dated the 8th March 1866 was confirmed, and that decree is now in process of execution.

The question which arose before both the Courts on the objection of the defendant, was whether the decree-holder had in his decree obtained the mesne profits which he had claimed. The first Court interpreted the decree in favor of the decree-holder. It held that the decree did virtually, though it did not do so in direct words, decree to him a sum of rupees 590 for mesne profits up to the date of suit, and left the question as to what would be the amount of mesne profits subsequent to the suit open to subsequent enquiries. The first Court decided this point upon that view of the decree.

The Judge, on appeal, does not very clearly give his opinion. But he thinks that by the terms of the decree nothing was decreed for wassilat. This does not very clearly show whether he means that wassilat was altogether omitted from the decree, or he means that only the amount of wassilat was omitted.

The special appeal to this Court is that there has been a misconstruction of the decree, and that the decree-holder is, under the terms of the decree, entitled to wassilat, if not to the exact amount for which he sued, at least to have the proper amount ascertained in execution.

The decree has been read to us, and we find that it is in these terms :—In the first place, the claim of the plaintiff is decreed with the exception of a particular portion of the land claimed. The decree then goes on to mention the particular pieces of land of which the plaintiff is to obtain possession and on which his possession is confirmed ; and without making any direct allusion to mesne profits, it goes on to decree the question of costs.

The question, then, for our decision is whether the words "the claim of the plaintiff be decreed with certain exceptions," are sufficient to carry the question of mesne profits ; and if they do, to what extent they carry the decree for mesne profits. There is no doubt that there is great looseness in the manner in which decrees for mesne profits are drawn up in the Courts of this country. Reference has been made to a decision to be found in XV Weekly Reporter, page 293, (which is a case very similar to this) in which also the decree did not distinctly declare that mesne profits ought to be given, but in which it was held by the Division Bench that in fact the mesne profits were decreed. On the other hand, we have been referred to another decision to be found in XI Weekly Reporter, page 200, in which the Chief Justice Sir Barnes Peacock rejected the application for execution for mesne profits when the decree did not distinctly declare that the decree-holder should obtain mesne profits.

I have no doubt, looking to the provision of Sections 196 and 197, that the Court should distinctly in its decree state whether it decrees mesne profits or not ; and it should equally distinctly state when it reserves any points for subsequent enquiries in execution of the decree what those points are. But in consequence of the loose manner in which decrees of our Courts are sometimes worded, if we are to carry out these provisions of law strictly, extreme injustice will be done in many cases. I think, therefore, that we should follow the Judges who passed the judgment in the case in XV Weekly Reporter, and interpret the decree as including mesne profits, if we can be satisfied that there was an intention on the part of the Court which passed the decree to award mesne profits even though the words mesne profits are not distinctly expressed therein.

The words in this case are undoubtedly sufficient. The claim of the plaintiff being decreed and mesne profits being a portion of that claim, mesne profits may be said to have been decreed. To satisfy ourselves of the intention of the Court, we have looked to the allegations of the parties to the suit to ascertain whether there was really any dispute upon the question. This is a case in which there could have been no doubt whatever upon the point. It was an ordinary case in which the plaintiff brought a suit, alleging that he had been dispossessed

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in consequence of an erroneous demarcation by the survey authorities, to rectify that demarcation and to recover possession of the land. The defendant declared that he was entitled to these lands and that he was in possession of them. Upon these issues, if the plaintiff obtained a decree he would have been clearly entitled to the mesne profits of the disputed land during dispossession. At the same time, it does not appear that any evidence was heard upon the question of the amount of mesne profits, and therefore it is very clear that no direct determination was come to us to their amount. We think that the proper mode of interpreting this decree is to consider that mesne profits were awarded to the decree-holder as against the parties who had dispossessed him from those lands, and that the question of the amount of mesne profits was left to be ascertained in execution of the decree.

However, the parties themselves or their legal agents seem to us very much to blame in not having it recorded distinctly that mesne profits were given; and this litigation both before the Judge and also before this Court seems to have been caused so far by the neglect of the decree-holder. We think, therefore, that we ought not to give costs in this Court or in the Lower Appellate Court.

The case must be remanded to the first Court in order that that Court may ascertain the amount of mesne profits to which the decree-holder is entitled from the date of dispossession to the date of the recovery of possession.

Mookerjee, J.—I am also of opinion that the decree awarded mesne profits to the plaintiff. The suit was for possession of land with mesne profits. The decree declared that with the exception of the lands of Sagurberiah, "*the rest of the claim* is decreed" in favor of plaintiff. Among that claim was undoubtedly the claim for wassilat, and I think therefore that that claim was also decreed. It is contended by the respondents' pleader that when costs have been separately awarded, and wassilat is not distinctly decreed, wassilat cannot come under the words "*the rest of the claim.*" But the plaint claimed mesne profits and not costs. Costs are not generally matters of claim, but are awarded by a Court in its discretion for the purpose of indemnifying parties to an action for expenses incurred by them in the conduct of the suit. In this case, the Court which passed the decree of the 8th March 1866 construed its own decree and held that the decree was for possession as well as mesne profits. The decree, however, does not declare or specify the amount of profits awarded, therefore that must be ascertained in execution.

The 8th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Possession (confirmation or recovery) —Title—Issues.

Case No. 1 of 1871.

Appeal preferred under Section 15 *of the Letters Patent of the High Court of* 28*th December* 1865, *against a judgment of the Hon'ble E. Jackson and the Hon'ble Onoocool Chunder Mookerjee, two of the Judges of this Court, dated the* 20*th March* 1871, *in Special Appeal No.* 1735 *of* 1870, *the said Judges having been equally divided in opinion.**

Moulvie Abdoollah (Defendant) *Appellant,*

versus

Shaha Mujeesooddeen *alias* Peeroo Meeah (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellant.

Baboos Sreenath Doss and *Kalee Mohun Doss* for Respondent.

Where a plaintiff in form seeks for *confirmation* of possession treating himself as being in possession, yet sets out and states circumstances which are in themselves a dispossession, namely, that a suit in which he intervened under Section 77 Act X of 1859 had been decided against him and the rent adjudged to defendant, the suit should be treated as one really for *recovery* of possession.

A suit for confirmation of possession on adjudication of a particular and specific title distinctly alleged, where defendant also puts forward a pedigree, supported by evidence, at variance with pedigrees put forward by plaintiff, is not sufficiently disposed of by the trial of the mere question of possession for 12 or 20 years before the suit.

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* 15 W. R., p. 286.

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Norman, C. J.—THE plaintiff brought this suit on 17th May 1869, for confirmation of his possession by declaration of his right in 10 annas of mouzah Baroollah. His case, as disclosed in his plaint and written statement, is that the entire mouzah Baroollah originally belonged to Shah Izrail, upon whose death it descended to his daughter, Jumal Bibee, from whom it came on her death to her two sons Kumalooddeen and Ruziooddeen ; that Kumalooddeen had a son named Hamidooddeen, and Ruziooddeen had two sons, Noorooddeen and Waizooddeen, and four daughters, Rohia Bibee and three others, of whom one, Rohia Bibee, was married to Hamidooddeen ; that Hamidooddeen being possessed of 8 annas and Rohia Bibee of 2 annas of mouzah Baroollah, joined in granting a *hibbah* to the plaintiff's father, Kulimooddeen, of 10 annas of that mouzah ; that the plaintiff succeeded his father Kulimooddeen, and had been in possession of the land in suit ; that the defendants brought a suit against one Alla Buksh for arrears of the entire 16 annas of the rent of certain lands held by the said Alla Buksh within the said mouzah on account of the year 1272 and a portion of the year 1273 ; and that the plaintiff intervened in that suit under Section 77 Act X of 1859, alleging that he had been in the receipt and enjoyment of 10 annas of the rent from Alla Buksh. He says that that suit was decided against him, that thereupon he appealed to the Judge, and on 17th August 1868 the Judge confirmed the decision of the Collector, dismissing his claim as intervenor.

As I have already observed, the plaintiff prayed for confirmation of possession by declaration of his right, without advertence to the fact that he had been or must have been put out of possession by the decision in the Act X suit, or to the fact which is undoubted and undisputed, that subsequent to the decision of the Act X suit, Alla Buksh, if ever he was the plaintiff's tenant, had been turned out of possession by the defendants.

The case was tried by Baboo Grish Chunder Roy. Moonsiff of Comillah. The Moonsiff laid down the proper issues ; first, whether the plaintiff's suit was barred by limitation ; secondly, whether plaintiff was in possession of the disputed land ; thirdly, whether the persons alleged by the plaintiff, or those alleged by the defendants, were the heirs of Jumal Bibee, daughter and heir of Shah Izrail, who had originally acquired the property in suit ; and fourthly, whether the 10 annas share of the rent-free property was the right of Shah Hamidooddeen and Rohia Bibee, and was in their possession ; fifthly, whether they conveyed the same under a *hibbah* to the plaintiff's father ; sixthly, whether the plaintiff's father and plaintiff himself have been successively in possession and enjoyment of the property, as alleged by the plaintiff, or whether the defendant and his predecessors have been successively in possession of the said property, as alleged by him.

The case appears to have been most carefully tried,—the whole title alleged by the plaintiff and the defendant appears to have been thoroughly gone into and considered, in a very creditable judgment, by the Moonsiff, who dismissed the plaintiff's case.

From that decision, there was an appeal to the Subordinate Judge of Tipperah, who raised three issues, and without going into the claim and title set up by the plaintiff reversed the decision of the Moonsiff. In adjudicating upon the three issues raised, he jumbles them all up together and tries them, as he calls it, simultaneously. He finds that the suit is not barred by limitation, and that upon the evidence the plaintiff by his tenant, Alla Buksh, the common tenant of the defendant and the plaintiff, had been in possession uninterruptedly for a period of more than 12 years.

Against that decision, there was a special appeal to this Court, which came on for hearing before Mr. Justice E. Jackson and Mr. Justice Onoocool Chunder Mookerjee. Those learned Judges differ on two points. Mr. Justice Onocool Chunder Mookerjee considers that "in a suit brought for confirmation of possession when the defendant denies that the plaintiff is in possession, it is incumbent on the plaintiff to prove that he was in possession of the land when the suit was brought." Mr. Justice E. Jackson, while admitting that this was the general rule, was of a contrary opinion so far as regarded this particular case ; and if that were the only point which we had to consider, we should be disposed to agree with the judgment of the senior Judge.

In this particular case, though the plaintiff in form seeks for confirmation of his possession and treats himself as being in possession, he nevertheless sets out and states circumstances which are in themselves a dispossession,—namely, that the suit in which he intervened under Section 77 had

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been decided against him and the rent had been adjudged to the defendant. We think, under these circumstances, that there would have been no difficulty in treating this as being really a suit for recovery of possession.

But there is another point on which the learned Judges also differ. Mr. Justice Mookerjee says that "in suits brought for confirmation of possession on an adjudication of a particular title, the plaintiff is bound not only to show that he was in possession at the date of suit, but that the title set up by him is a good and valid title. The defendant traversed all the allegations made by the plaintiff and impeached the genuineness of the *hibba*; and, consequently, the Subordinate Judge was bound to see whether the title set up was made good by the plaintiff." Mr. Justice E. Jackson says:—"It is urged in special appeal that the title set up by the plaintiff has not been enquired into, but that the decision has gone wholly upon the question of possession. The Subordinate Judge, differing from the Moonsiff, finds that the plaintiff and his father have been in possession of 10 annas of the *lakheraj* estate for more than 20 years, and that the father of Alla Buksh, as well as the tenant Alla Buksh himself, have for that time paid plaintiff a 10 annas share of the rent of the disputed land. Under these circumstances, the Subordinate Judge holds that the plaintiff is entitled to have that 20 years' possession confirmed. I am not prepared to say that he is wrong in this decision. It is supported by ample evidence a great portion of which has been read to us. It appears to me that even if the plaintiff could not prove his hibbanamah, still this 20 years' possession would entitle him to be replaced in the possession from which the decision of the rent suit had to some extent removed him."

Now, while I am prepared to admit that although the plaintiff might be entitled to a decree restoring him to possession on proof of 12 or 20 years possession before suit, though he should fail in proving the specific title set up, I think it quite clear that a distinct allegation having been made and the suit having been based on a particular and specific title put forward by the plaintiff, and the defendant having also put forward a pedigree of the family supported by distinct evidence, directly at variance with the pedigrees put forward by the plaintiff, the Subordinate Judge could not properly try the case or decide upon the questions between the parties without enquiring into the title alleged by the plaintiff, as well as the question whether the plaintiff was, as he alleges, in possession for 20 years before the suit. It is quite certain that very considerable light would be thrown upon the evidence as to possession if the history of the title had been investigated by the Subordinate Judge. For these reasons, I do not concur in the opinion of Mr. Justice E. Jackson in thinking that the case has been sufficiently disposed of by the trial of the mere question of possession for a period of 12 or 20 years before the suit.

In the present case, I am of opinion that the suit ought to be remanded to the lower Court; and I would suggest that it should go back to the Judge of the district in order that a more careful enquiry may be instituted than the Subordinate Judge has thought fit to bestow upon the question before him.

Jackson, J.—I quite concur; and I rejoice that the plaintiff and the defendant should have the chance of a more careful trial than that had in the Lower Appellate Court. The decision of the Subordinate Judge appears to me to compare most unfavorably with the careful and well-considered judgment of the Moonsiff whose decision he sets aside.

Macpherson, J.—I concur with the learned Chief Justice.

The 8th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint decree—Execution by some of the decree-holders—Section 207, Code of Civil Procedure—Limitation.

Case No. 97 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dacca, dated the 4th January 1871.

Shib Chunder Dass and others (Decree-holders) *Appellants,*

versus

Ram Chunder Poddar (Objector) *Respondent.*

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Baboo Nullit Chunder Sein for Appellants.

Baboo Rash Beharee Ghose for Respondent.

When some of the decree-holders in a joint decree apply for execution, the application may be refused or granted at the discretion of the Court, which is bound to see that injury is not done to the rights of absent decree-holders; but whether the Court does so or not, all recoveries in execution so made must be for the benefit of all the decree-holders.

When a Court under a mistaken view of the law allows any of the holders of a decree to execute a portion of the decree, such execution cannot be excluded from the calculation when the question of limitation is raised.

Jackson, J.—THE appellants to this Court were joint decree-holders with others, who from time to time were allowed to execute the portion of the decree to which each were entitled according to their respective shares. The appellants are now taking out execution for their share and are met by the plea of limitation. The lower Court has decided that further execution is barred by limitation. The appellants are out of time if the period of three years limitation is calculated from the date of the decree, but they are within time if it is calculated from the previous execution proceedings. The lower Court is of opinion that the previous execution proceedings were contrary to law, because the sharers in the joint decree were illegally allowed to execute it for their own shares, and their execution of portions of the decree will not keep alive other portions of it. In support of this view, the lower Court quotes 13th Weekly Reporter, page 224, That, however, was a case in which distinct decrees were given to separate plaintiffs for separate portions of the decree. It was not a joint decree and could not have been jointly executed. The decision referred to by the lower Courts alludes to other decisions of this Court in which it has been held that proceedings in execution of portions of a joint decree do keep in force the execution of the whole decree. The lower Court has taken no notice of those other decisions. There are numerous rulings of this Court in support of the above view,—1st Weekly Reporter, page 2, Miscellaneous Rulings; 6th Weekly Reporter, page 76, Miscellaneous Rulings; 8th Weekly Reporter, page 101; 9th Weekly Reporter, page 486; 11th Weekly Reporter, pages 343 and 421; 13th Weekly Reporter, page 128. Some of these rulings are directly in point. We concur in the view then taken of the law. When some of the decree-holders in a joint decree apply to execute the decree, the Court is at liberty to refuse to allow them to execute or to permit it. Section 207 gives the Court a discretion, only laying down a provision in favor of the absent decree-holders that the Court is to see that their rights are not injured. If the Court has not taken any notice of this provision to guard the rights of absent decree-holders that fact cannot be pleaded by the judgment-debtor as making the execution illegal. In fact, whether the Court has made any such provision in favor of absent decree-holders or not, their rights would not be injured by the acts of their co-decree-holders. All recoveries in execution so made would be recoveries for all the decree-holders, and those who were absent would be entitled to share with those who were present, if the whole amount of the decree could not ultimately be realized. The sharers in a joint decree by executing can only realize for the joint decree-holders, and not for themselves separately, in whatever terms they may execute the decree or be allowed to do so. It is true that the Court should not have allowed any of the decree-holders to execute a portion of the decree; but such execution cannot be pronounced so wholly illegal that the proceedings cannot be calculated within the period of limitation, when the Court has, from a mistaken view of the law, allowed them.

The decision of the lower Court must be set aside with reference to the above rulings of this Court, and the execution of the present decree-holders allowed to proceed. Costs of this Court to be paid by the respondents, and costs of the lower Court to be paid by the judgment-debtors.

The 8th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Execution—Mesne profits—Jurisdiction.

Case No. 113 of 1871.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 6th January 1871, *modifying an order of the Moonsiff of that District, dated the 1st September* 1870.

Ram Kanaye Ghose and another (Judgment-debtors) *Appellants,*

versus

Gooroo Prosunno Roy (Decree-holder) *Respondent.*

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Baboos Oopendro Chunder Bose and *Umbika Churn Banerjee* for Appellants.

No one for Respondent.

HELD, that the judgment of the Privy Council reported in 14 Weekly Reporter, page 23, in no way militates against the Full Bench Ruling (6 Weekly Reporter, Miscellaneous, page 109,) which laid it down that under Section 11 Act XXIII of 1861 the Court executing a decree is not to determine whether mesne profits are to be awarded or not, but only the amount of such profits.

Loch, J.—IT appears that the decree in this case awarded possession of the disputed land with mesne profits from the year 1267 to 1271; but there was no order in it for the mesne profits payable from the time of the institution of the suit up to the time of delivery of possession, and the first Court in executing the decree refused to give mesne profits for this period, extending from 1272 to 1277, on the ground that the decree was entirely silent on this subject, and therefore the Court has no authority to award wassilat for that period. The Judge, on appeal, set aside the order of the Court of first instance, holding that under the provisions of Section 11 Act XXIII of 1861 the Court might award mesne profits from the date of suit to the date on which the possession was obtained, whether the decree awarded any such mesne profits or not.

We think that this point thas been determined by the Full Bench Ruling reported in the 6th Weekly Reporter, page 109, Miscellaneous Rulings. In that case it has been laid down distinctly that under that Section the Court executing the decree is not to determine whether mesne profits can be awarded or not, but it can only determine the question of the amount of such mesne profits. A reference has been made to the judgment of the Privy Council reported in the 14th Weekly Reporter, page 23, which appears at first sight to be opposed to the ruling of the Full Bench of this Court; but on reading carefully the words of that judgment, it appears to us that in that case their Lordships of the Judicial Committee were only interpreting the particular decree to which they referred, and therefore it is not to be considered as in any way militating against the Full Bench Ruling above referred to.

Another objection in the appeal before us has been taken that the amount of mesne profits has been calculated upon a wrong principle, and as the defendant was in actual possession of these lands the principle laid down by the Full Bench in the 9th Weekly Reporter, page 445, should be followed. We think that this contention is right. As the lands were originally held by the decree-holder through tenants, he is not entitled to the value of the produce thereof.

We therefore reverse the orders of both the lower Courts, and remand the case to the Court of first instance to be disposed of with reference to the above remarks. Costs to follow the result.

The 9th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Joint family property—Father's interests—Execution sale—Necessity.

Case No. 2 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 19th May 1870, modifying a decision of the Moonsiff of that District, dated the 10th September 1870.

Bhyro Pershad and another (Plaintiffs) *Appellants,*

versus

Basisto Narain Pandey and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Kalee Mohun Doss* for Appellants.

Mr. C. Gregory and *Baboos Sreenath Dass, Romesh Chunder Mitter,* and *Bama Churn Banerjee* for Respondents.

The father in an undivided family under the Mitakshara law has no interest in the ancestral property which can form the subject of a sale beyond the proceeds; having merely a life interest in a common property, which he can neither give away nor sell.

A sale of such property in execution of a decree made on a debt which was not a necessity, is not valid and cannot be upheld, even though the proceeds of sale are appropriated in satisfaction of another decree on a bond by which money had been borrowed on an essential necessity. In such a case, however, the parties suing for annulment of the execution sale are in equity bound to pay to the auction-purchasers so much of the debt as would have been a burden on the estate.

Glover, J.—THE plaintiffs in this case, sons of one Oodit Narain Singh, sued to set

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aside a sale made in execution of a decree, to recover possession of a 1 anna 4 pie share in the family estate, and to have their joint right declared in the 8 pie share of their father.

The plaintiffs are members of an undivided Hindoo family governed by the Mitakshara law.

Their father Oodit Narain appears to have been considerably in debt, and one of his creditors Hunooman Pershad took out execution of a decree he had obtained against him and sold the disputed property in satisfaction. The sale proceeds, however, were to a great extent carried off by another and more astute creditor, Jowahir Lall, who had taken the precaution to effect a prior attachment under a decree of his own, and he was by order of Court first satisfied leaving Hunooman Pershad and other creditors to divide the balance rateably according to the amounts of their decrees.

The sons claim to set aside the sale, on the ground that their father had no power of alienation even over his own portion of the ancestral estate, unless the obligation for which the sale was made was one of necessity such as the Hindoo Law allows; that the sale in this case was in execution of a personal decree against Oodit Narain and had nothing to do with any family necessity.

The defendants, who represent the purchasers, reply that they bought in good faith for value, and that as the sale money was applied to pay off a decree on a debt incurred for payment of Government revenue the transaction was one of necessity which the father could enter into for the benefit of the estate, and the sale was therefore good.

The Moonsiff held that the sale in execution only passed the father Oodit Narain's share in the estate, *viz.*, 8 pie, and that the sons were entitled to recover their own shares. He did not go into the question as to legal necessity or power on the part of the father to alienate. He took for granted that the father had a specific share in the estate, and that that share could be and was sold in satisfaction of the decree against him.

The auction-purchasers appealed to the Subordinate Judge, who reversed the decision of the Moonsiff and dismissed the plaintiff's suit *in toto*, holding that as the whole family had been benefitted by the money borrowed by Oodit Narain from Jowahir Lall the debt ought to be paid by the whole family, and that as the sale in execution paid that debt, Jowahir Lall having satisfied himself out of the proceeds, the sons could not recover their shares nor could the sale be set aside. The Subordinate Judge further declared his belief that the father and sons were acting together in fraud of their creditors.

The sons appeal specially, urging that they have by law an undivided interest in the family property which their father could not alienate except for such necessity as the law allows, and (of which there was no reliable evidence) that the right and interest of the father only passed at the sale in execution.

With regard to this last objection, it seems to us that if Oodit Narain had any separate interest which could pass by sale, the sale in execution under which defendants claim could only pass that interest. The words of the certificate are perfectly clear, and they are to the effect that what was sold was Oodit Narain's right and interest in the property, and no more.

There is a case (Gour Surun Doss *versus* Ram Surun Bhukut, V Weekly Reporter, 54) in which it was ruled that the rights of sons in ancestral property under the Mitakshara Law were saleable in satisfaction of any claims against them, and the principle, if sound, would probably apply to fathers; but this view of the law has been much modified of late, and in the Full Bench case of Rajaram Tewaree *versus* Luchmun Pershad, VIII Weekly Reporter, 15, it was laid down that a father could not alienate his own share of ancestral property except with the consent of his sons, or for some urgent necessity. And I remember another case decided more lately, but which has not, I think, been reported, where it was decided that so long as the family remained undivided, the father's share could not be taken out of the family even for the payment of his own debts. I was one of the Judges who took part in the case of Gour Surun Doss *versus* Ram Surun Bhukut, but further consideration has made me doubtful of the correctness of the decision in that case. It seems to me that the father in an undivided family under the Mitakshara law has no interest that can form the subject of a sale beyond

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his share of the proceeds. Until partition is effected, he has merely a life interest in a common property, which interest he can neither give away nor sell. And the reason of this seems to be, as laid down by the Privy Council in the case of Appoovier *versus* Rama Suba Aiyan and others, XI Moore, 75,* that no one in the position aforesaid and no individual member of the family can predicate, so long as the family remains undivided, that he has a certain definite share. The members of the family may be added to by births subsequent to the sale of any one individual's share, in which case all the other members would suffer a proportionate loss. In fact, until partition is effected, there can be no finality regarding the interest of any member of the family, and no one can tell what that interest may be.

In the present case, the father Oodit Narain's share has been sold as representing a 2 annas share of the whole estate, and it is not denied that possession of that aliquot share has been taken by the auction-purchasers. It appears to me that neither this nor any other share could have been sold in execution, the other owners not having consented to the alienation. It might possibly be that the auction-purchasers in buying the right, title and interest of Oodit Narain in the family estate, bought the right to his share (whatever for the time being it might be) of the profits—a right which would cease at his death. But this is not the defendants' case. They claim to retain their purchase on the ground that the sale proceeds were applied to liquidate a debt incurred for legal necessity and which Oodit Narain had the sole power to incur, his sons being at the time minors.

And this brings us to the question of necessity.

Now there is no doubt, that the sale in execution of Hunooman Pershad's decree was not made on any such necessity as the Hindoo Law allows. It has not been contended that Oodit Narain's debt to Hunooman Pershad was any thing more than a personal one, or that the ancestral property could be brought to sale for such debt without the consent of the other owners, the plaintiffs. The argument is that inasmuch as the sale proceeds were taken by Jowahir Lall in satisfaction of a decree obtained on a bond by which money was borrowed for an essential necessity, *viz.*, the payment of Government revenue, and inasmuch as the plaintiffs benefitted by the loan so obtained, it having been applied to save the family estate from sale, the result is that the execution sale under Hunooman Pershad's decree has been of the same effect as one under Jowahir Lall's decree; and as the latter sale, if it had taken place, would have been valid the debt being a necessary one, the former should not for equitable reasons be disturbed.

I do not think that in special appeal we ought to proceed in this way. The decree under which the estate was put up for sale was one made on a debt that was not a necessity, and it is this sale which it is sought to set aside; and if we find that the sale was an improper one, can we go further and mend what was in its inception illegal by referring to the subsequent appropriation of a portion of the money? Had execution been taken out, and the estate have been put up for sale at the instance of Jowahir Lall, the sons might have thought it worth while to save the property by paying the debt, knowing that that debt was incurred for a "necessity" which involved the whole family, whilst they did not pay off Hunooman Pershad's decree knowing equally that it was one for which the ancestral estate was not liable. They may very naturally have supposed that Hunooman Pershad's debt would have been the only one satisfied out of the sale proceeds, and although their object would have been morally wrong they would have committed no legal offence.

On the whole, I think that they are entitled to an order annulling the sale made in execution of Hunooman Pershad's decree. At the same time, I consider that they ought not to be allowed to take advantage of that sale without re-imbursing the auction-purchasers so much of the money as would have been a burthen on their estate, and for which the estate might and would have been legally sold if Jowahir Lall had brought it to sale instead of Hunooman Pershad. If they want equity they must do equity.

The order, therefore, that I think should be made is that the execution sale should be set aside on the plaintiffs' paying into Court the amount taken by Jowahir Lall; such amount to be handed over, with interest at 6 per cent. from the day of sale, to the auction-purchasers. It appears from the record that Jowahir Lall's claim was in all

* 2 W. R., P. C., p. 21.

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rupees 553-10, and on the plaintiffs re-paying that sum with interest I think there should be a decree in their favor, but under the circumstances without costs.

Kemp, J.—I concur in this judgment.

The 9th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 15 Act XIV of 1859—Onus probandi.

Case No. 51 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 3rd November 1870, *reversing a decision of the Moonsiff of that District, dated the 26th February* 1870.

Surbo Mohun Roy and others (Plaintiffs) *Appellants,*

versus

Surut Chunder Roy (Defendant) *Respondent.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellants.

Baboos Kallee Mohun Doss, Doorga Mohun Doss, and *Nuleet Chunder Sein* for Respondent.

Although in a suit to set aside an award made under Section 15 Act XIV of 1859, plaintiff must establish his own title before the party in possession can be required to make good his case, a Judge should look into the summary case itself and ascertain if there had been a proper enquiry and trial in that case.

Jackson, J.—We think that this case must be remanded to the Judge for a proper decision. As the case stands at present, there has been no decision at all. The parties are at distinct issue on the facts as to the mode in which this chur was formed, and their respective title to the chur will rest upon those facts. The Judge alludes to the map which has been filed in this case, and says looking at it that it rather proves the defendant's case than that of the plaintiff. How the map alone proves any thing we cannot see, and in what manner and of what fact the Judge considers that it is proof it is impossible to ascertain from his judgment. The Judge further goes on to say that the evidence of the plaintiff's witnesses is no more to be relied on than that of the defendants. This is in reality no decision upon the evidence. There are certain facts which are deposed to by these two sets of witnesses, and it is for the Judge to decide which story is true.

The Judge says in a previous part of his judgment that it has now become an established principle that a plaintiff who comes to set aside an award made under Section 15 Act XIV of 1859, must clearly establish his own title before the party in possession can be required to make good his case. This is a correct principle. But looking to the mode in which Section 15 Act XIV of 1859 cases are frequently tried, we think it would be as well if the Judge, before applying this principle with great strictness, looked into the summary case itself and ascertained if there had been a proper enquiry and trial in that case. Of course, the plaintiff in all circumstances must be required to prove his case.

We remand this case to the Judge for re-determination.

Costs to follow the result.

The 9th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Butwarrah—Injunction to Collector—Section 5 Regulation XIX of 1814.

Case No. 59 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 27th December 1870, *modifying a decision of the Moonsiff of Bajitpore, dated the 28th December* 1869.

Dewan Abdool Reza (Plaintiff) *Appellant,*

versus

Jebunnissa Bibee and another (two of the Defendants) *Respondents.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboos Hem Chunder Banerjee, Doorga Mohun Dass and *Issur Chunder Dass* for Respondents.

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In a suit for declaration of title in which plaintiff also claimed an allotment of his share which had been refused him by the Collector in a butwarrah then in progress:

HELD that, as it was found that plaintiff's title was established, he was also entitled under Section 5 Regulation XIX of 1814 to a precept to the Collector directing him to award to the plaintiff a share corresponding with that title.

Jackson, J.—THERE seems to be no ground for interfering with the decision of the Judge below on the points which are stated in his judgment. But there is one point which has been apparently omitted from it, and upon which we think the plaintiff is entitled to a decree. His claim was not only for a declaration of his title to the 16 gundahs of the estate, but also for an allotment of his share which was refused to him by the Collector under the butwarrah proceedings which were then being made. The estate being one paying revenue to Government, and the Courts being unable to make the allotment, it is the duty of the Collector to make this butwarrah; and as the Collector on the former occasion in making the butwarrah refused the plaintiff his share, and as it has now been found that the plaintiff is entitled to his share, the plaintiff is also entitled under Section 5 Regulation XIX of 1814 to a precept to the Collector directing him to award to the plaintiff a share corresponding with his 16 gundahs in this estate. The defendants to pay the costs of the butwarrah. Each party will pay his own costs of this litigation.

A precept will issue from this Court to the Collector.

The 9th June 1871.

Present:

The Hon'ble F. A. Glover and G. C. Paul, *Judges.*

Resumption — Settlement — Under-tenures.

Case No. 88 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 21st November 1871. *affirming a decision of the Moonsiff of Bancoorah, dated the 5th August* 1870.

Protap Narain Mookerjee (Plaintiff) *Appellant,*

versus

Modhoosoodun Mookerjee and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Rash Beharee Ghose for Respondents.

The settlement of revenue in consequence of resumption under Regulaton XIX of 1793 cannot confer a new estate upon the lakherajdars, but merely fixes and limits the demand as respects revenue originallychargeable. Such resumption and settlement therefore do not extinguish under-tenures.

Paul, J.—THE plaintiff, as the zemindar of one-half of mouzah Shabanda, sued the defendants, as ryots holding 18 beegahs and some cottahs of land in that mouzah, for one-half of the rents of the year 1276, after deducting therefrom his individual ⅛th share of the same, and he based his claim to such rent on a settlement made in the course of certain resumption proceedings in which the sum claimed as rent was set down against the names of the defendants and the plaintiff as ryots of the 18 beegahs and odd cottahs of land.

The relations between the parties are somewhat complicated, but they are as follows:—

The plaintiff and the defendants are seven brothers, and they jointly inherited from their father who died in 1263, or 1856, the mokurruree tenure of the mouzah Shabanda granted some time previously by the zemindar. They also inherited one-half of the zemindaree right in that mouzah from their father who had acquired the same previous to his death; and it would appear that the plaintiff himself purchased the other half of the zemindaree right in the above-named mouzah in 1852. Some time after the death of the father of these parties, mouzah Shabanda was resumed by Government as an invalid lakheraj. In the course of resumption proceedings an assessment was made on the lands of the resumed mouzah, and according to that assessment the plaintiff and his brothers, who were and are ryots of 18 beegahs and odd cottahs above referred to, were assessed at rupees 8-7 in respect of those lands. A settlement was on the 26th March 1867 made by Government with the plaintiff and his brothers, on the usual terms of ½ jummah of the whole mouzah. The plaintiff was dissatisfied with this settlement as he claimed to be zemindar in his individual right of ½ of the mouzah.

The plaintiff, accordingly, brought a suit in the Civil Court against his brothers

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(the present defendants) and others, to enforce his right to have the settlement of ½ the mouzah made with him separately. This suit the plaintiff instituted on the 12th April 1867, and he obtained a decree therein declaring his separate right and title to ½ of the mouzah.

The result of this suit was that the settlement was re-formed by its being made as regards ½ of mouzah Shabanda with the plaintiff and the other half with the plaintiff and the defendants jointly. Having succeeded thus far, the plaintiff next proceeded to institute the present suit.

The plaintiff states that he is zemindar of ½ of the mouzah; that the defendants jointly with himself are ryots of 18 beegahs 3 cottahs of land in mouzah Shabanda; that according to the settlement made 8 rupees 7 annas is the rental fixed as payable by himself and his brothers in respect of these lands; and that he is entitled to ½ of rupees 8-7 after deducting his ¼th share of the same.

The defendants pleaded in answer to the plaintiff's claim that an intermediate mokurruree tenure existed and was interposed between the zemindar and the ryots, and that consequently the rents payable by them as ryots were not payable to the zemindar, but to the mokurreedars.

The plaintiff, in refutation of this plea, insisted that the effect of the resumption and settlement was to annihilate and destroy the mokurruree tenure, and that the mokurruree tenure being thus extinguished he was entitled to take the rent directly from the ryots.

The first Court relying on a decision of a Full Bench of the High Court, III Weekly Reporter, page 72, ruled that the resumption of the lakheraj mouzah did not extinguish the mokurruree, and held as a necessary result from this ruling that the plaintiff's action for rent against the ryots was not maintainable.

The Lower Appellate Court upheld the decision of the first Court. From the decision of the latter Court the special appeal has been preferred, and in the course of the argument addressed to us by Baboo Kishen Succa Mookerjee for the appellant, the contention raised before the lower Court has been very ably put forward in various shapes. These arguments, urged with so much diversity, resolved themselves into one main ground on which the judgment of the lower Court is assailed, namely, that by the resumption the mokurruree title was extinguished.

The appellant bases his contention on rulings of the late Sudder Court to be found in the Volume for 1850, page 167, and in the Volume for 1860, pages 601, 602. In these cases, it was held that the resumption of an estate held as lakheraj operated in extinguishing all under-tenures. A Division Bench of the High Court, disapproving of this enunciation of the law, referred the question of the extinguishment of under-tenures by the resumption of the parent estate to a Full Bench. A Full Bench of the High Court by a decision reported in Volume III, Weekly Reporter, page 72, declared the law on the subject as follows:—

"When a lakherajdar has entered into a "contract with a tenant, whether for a term, "or in perpetuity, both parties are in strict "law bound to the conditions of the con-"tract. We, therefore, do not think that "the mere resumption of the lakherajdar's "tenure by Government, that is, the mere "fact that that tenure has been rendered "liable for the payment of revenue can of "itself, as a matter of law, dissolve the con-"tract entered into between the parties."

The proposition thus enunciated is not supported by any full reasoning on the subject; and the case before the Sudder Court in 1850, wherein the lakherajdar having to pay rupees 150 as the jummah fixed on the lands held in mokurruree, whilst the mokurruree jummah was only rupees 10, sought on that ground to extinguish the mokurruree tenure, exhibited so much of apparent hardship, that we have deemed it right to look deeper into the principle which establishes the rule that the resumption and settlement of a lakheraj estate does not operate in extinguishing under-tenures.

Obviously, the argument which advances the proposition that, upon and by reason of the resumption and settlement of a lakheraj estate, all under-tenures are extinguished, must proceed on the grouud that a new estate is created under a settlement consequent on a resumption; for if a new estate is created, we are not aware of any principle of law which would entitle the lakherajdar to be released and relieved from his contract by which he created a mokurruree or any other under-tenure. The question which

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we have to consider is whether, under the circumstances already stated, a new tenure is created under a settlement with the lakherajdar consequent on a resumption.

In order to obtain a clear view of the subject, it is necessary to glance at some of the Sections of Regulation XIX of 1793 and Regulation II of 1819.

Section 5 Regulation XIX of 1793 provides as follows :—" By continuing the proprietary right in the land to the grantee or possessor, in the cases specified in the preceding Section, *instead of dispossessing him of the land altogether, agreeably to former usage, and assessing the land in the mode provided in the two following Sections, a liberal* provision will be left to him. Where the grant may have been made before the Bengal year 1178, or the Fussily or Willaity year 1179, the proprietor will hold his land as an estate paying a fixed revenue of only half the amount assessed on other malgoozaree lands in the country ; and where the grant may have been made subsequent to the above-mentioned periods, he will hold the land as subject to the payment of the same revenue as other lands assessed with revenue, under the rules for the decennial settlement, as hereafter directed."

Section 6 of Regulation XIX of 1793 enacts that the revenue assessed on lands not exceeding 100 beegahs alienated before the 1st December 1790 is to belong to the zemindar.

Section 7 of the same Regulation enacts that revenue on lands exceeding 100 beegahs alienated prior to 1st December 1790 shall belong to Government.

Section 8 Clause first provides as follows :—" The amount of the revenue payable from the lands specified in Section 7 is to be adjusted according to the following rules."

Clause second.—" If the grant shall have been made previous to the Bengal year 1178, or the Fussily or Willaity year 1179, (according as the lands may be situated in Bengal, Behar, or Orissa,) the revenue to be paid to Government shall be equal to one-half of the annual produce of the land, calculating according to the rates at which other lands in the pergunnah of a similar description may be assessed. If any part of the land shall be uncultivated, the proprietor is to be required to bring it unto cultivation, and to pay such russud or progressive increase, to be regulated with a reference to the reduced rate of the assessment on the cultivated land, as the Board of Revenue, with the sanction of the Governor General in Council, may deem reasonable. The produce of the land shall be ascertained by a survey and measurement, one-half of the expense attending which is to be defrayed by the proprietor in the event of his agreeing to the jummah required of him, and the other moiety by Government ; or by such other mode of investigation as the Collector, with the sanction of the Board of Revenue, may judge advisable. If the proprietor shall refuse to agree to the assessment, the lands are to be let in farm or held khâs under the rules prescribed in Regulation VIII of 1793. If the proprietor shall agree to pay the revenue that may be required of him, the amount shall not be liable to any variation in future, but he and his heirs and successors shall hold the lands at such fixed revenue for ever."

Clause third.—" If the grant shall have been made subsequent to the Bengal year 1178, or the Fussily or Willaity year 1179, (according as the lands may be situated in Bengal, Behar, and Orissa), the revenue or jummah to be paid to Government from the land shall be assessed agreeably to the rules prescribed in Regulation VIII. 1793, for forming the settlement of estates paying revenue to Government, and the produce shall be ascertained and the expense of the investigation defrayed in the manner specified with regard to the land, in the preceding Clause. If the proprietor shall refuse to agree to the assessments, the lands are to be let in farm or held khâs under the rules for the decennial settlement. If the proprietor shall agree to pay the revenue that may be required of him, the amount shall not be liable to any variation in future, but he and his heirs and successors shall hold the land at such fixed revenue for ever."

Regulation II of 1819 enacts more efficient remedies for the assessment of lakheraj estates, but by Section 7 provides for the attachment of estates (the subject of investigation) only in case the party in possession withhold certain necessary and important information at his command.

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These provisions of the law on the subject of what is called resumption and settlement of lakherajdar estates distinctly shew that the owner of a lakheraj estate is neither divested of his property in, nor of his possession of, such estate resumed for the purpose of assessment. An owner of this description of estate is made liable to the payment of the assessment to which his lands were by law subject, and which liability from the fact of the estate being resumed must be taken to have been long evaded. The lakherajdar on agreeing to pay the assessed rent—by entering into a settlement for the same—is left in possession of his estate, which by the operation of the settlement is brought into the category of permanently settled estates.

It thus appears clear that the settlement of revenue assessable in consequence of resumption does not and cannot confer a new estate on the lakherajdar; it merely fixes and limits the demand as respects revenue originally chargeable on the estate of the lakherajdar.

These being our views, it follows that the mokurruree lease was not cancelled or extinguished by the resumption and settlement, and consequently the contention of the dependant ryots that they are liable to pay rent to the mokurrureedar, and *not* to the zemindar, is made out.

Under these circumstances, the suit of the plaintiff was rightly dismissed by the lower Courts, and we affirm those decisions by dismissing this appeal with costs.

The 9th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Execution—Waiver.

Case No. 106 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 13th April 1871, modifying an order of the Subordinate Judge of that District, dated the 30th November 1870.

Gopee Kishen Gossain (Judgment-debtor) *Appellant,*

versus

Hem Chunder Gossain (Decree-holder) *Respondent.*

Mr. T. H. Cowie and *Baboos Obhoy Churn Bose* and *Mohendro Nath Mitter* for Appellant.

Baboos Sreenath Doss and *Hem Chander Banerjee* for Respondent.

H C obtained a decree against *G R* for the reconstruction in the family house within one month of a verandah which had been improperly pulled down by the latter; the re-construction to be according to an estimate not exceeding a specified amount. An alternative also was given to the judgment-debtor to bring a regular suit for partition, and both alternatives failing the decree-holder was to be allowed to re-build the verandah himself and be re-imbursed by the judgment-debtor. Twenty days after final orders on appeal, the latter applied to professional builders to begin the repairs. About a month after they were begun, the decree-holder procured an injunction to stop the work as not being according to the decree, and applied to the Court for permission to make the repairs himself. The judgment-debtor pleaded necessity, but the Subordinate Judge finding that he had made considerable alterations in the building, decreed as an alternative a new arrangement avoiding the inconveniences complained of by the decree-holder. The Judge in appeal reversed this order, and ordered that the verandah should be rebuilt according to the plan filed in the original suit, and that, as the judgment-debtor had exceeded the month allowed him the decree-holder might re-build the verandah himself.

HELD that in making alterations which caused inconvenience to the decree-holder, the judgment-debtor had contravened the decretal order.

HELD, however, that the decree-holder's conduct in looking on without remonstrance for nearly a month while the judgment-debtor incurred considerable expense amouted to a waiver of his right to take matters into his own hands.

HELD that if the judgment-debtor's plan could not be proceeded with without the inconveniences complained of, he must adhere to the decree and carry out its terms at the risk of the decree-holder.

Glover, J.—THE parties to this case are relatives and occupy the same family house.

Hem Chunder Gossain obtained a decree against Gopee Kisto Gossain ordering the latter to re-construct a verandah in the family house which had been improperly pulled down by him, within one month of the date of final orders. The verandah was to be re-built according to an estimate and the cost was not to exceed rupees 1,070. There was an alternative given to defendant by which he could avoid the re-building, namely, that he should within one

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month bring a regular suit for partition which would include the disputed verandah. Failing both of these alternatives, the plaintiff (decree-holder) was to have the right of re-buildig the verandah himself and be re-imbursed by the defendant the expense not exceeding the estimate of rupees 1,070.

The defendant brought no suit for partition, but on the 25th of April, that is, 20 days after final orders on appeal had been passed in the case by the High Court, applied to Messrs. Burn & Co., builders, to take the repairs in hand. These were commenced, it appears, on the 26th of the month.

On the 28th of May following, the decree-holder procured an injunction forbidding the defendant from proceeding with the repairs on the ground that he was not making them in accordance with the decree.

The repairs were stopped accordingly, and the decree-holder applied to the Court praying that under the terms of the decree he might be allowed to make the repairs himself. The reason given was that the judgment-debtor had acted altogether contrary to the Court's order, and had moreover not re-built the verandah as he was bound to do within a month from the 5th of April, the date of the final order.

The judgment-debtor replied that he was carrying out the decretal order to the best of his power; that it was impossible to re-build the verandah without first strengthening the suporting wall; and that if by building an addition to that wall for strengthening purposes he had narrowed the verandah a little he could not be blamed, inasmuch as the old wall was only a kutcha-pucka erection, and would not, according to the opinion of a professional builder, bear safely the re-erection of the verandah.

The Subordinate Judge found that the judgment-debtor had contravened the terms of the decree, and had in re-building the verandah made considerable alterations in the premises. He held, therefore, that in order to avoid any narrowing of the verandah and any blocking up of doors and windows, a new wall should, if the decree-holder did not object, be built in the place of the old one, the decree-holder's family vacating the upper rooms of the house for the time necessary, the decree-holder paying all the cost over and above the original estimate of rupees 1,070, but that if the decree-holder did not consent, the wall should be strengthened as suggested by the Assistant of Messrs. Burn & Co., Mr. Cox.

Against this decision the decree-holder appealed, and the Judge reversed the order holding that the Subordinate Judge could not go beyond the terms of the decree, and that the verandah must be re-built according to the plan filed in the original suit. He held further that as the judgment-debtor had failed to re-build the verandah within the month allowed by the decree, the decree-holder was entitled to take matters into his own hands and re-build the verandah himself.

The judgment-debtor now appeals specially to this Court and contends

(1) That the Judge was wrong in supposing that the Subordinate Judge went beyond, or substituted any thing in place of, the original decree ; and

(2) That the neglect of the decree-holder to take any steps before the 28th of May amounted to a waiver of his right to interfere, or to have the building arrangements transferred to himself.

The first ground of appeal does not seem tenable. The Subordinate Judge, no doubt, made the building of a new wall contingent on the decree-holder's acquiescence, but as consent was not given there has been no alteration in the decree so far ; but he allowed, in case the new wall was not built, certain alterations to be made in the original plan for the purpose of adding strength to the building. These alterations consisted of a strengthening wall, and some arrangement of posts and iron plates the meaning of which is not very clear. Now, the strengthening wall made a very great change in the state of affairs. Mr. Cox in his evidence admits that besides narrowing the verandah, which under the circumstances would be of little importance, his new wall has closed in two windows which were formerly open and has generally obstructed the passage of light and air to the rooms on the ground floor. He admits also that the door of one of the small godowns at the head of the verandah has been blocked up. Now the decree-holder alleges that these passages are necessary to him, in order that he and the members of his family may pass from one part to another of the joint premises, especially

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to one part called the chik verandah, from which the women of his family are accustomed to look at the poojah going on in the Poojah-dalan. In any case, it is clear from Mr. Cox's evidence that the repairs have taken away conveniences which before existed, and will, if carried out, result in the decree-holder's being in a worse position than he was before. It is argued that to re-construct the verandah as it was before is impossible, that the supporting wall is old and weak, and that the taking out from it of the ends of the old beams and replacing new ones would endanger the safety of the upper buildings in which the decree-holder's own family resides. But if this be so, the proper course for the judgment-debtor to have adopted would have been to decline to re-build, giving as his reason the impossibility of exactly carrying out the decretal order, and to have allowed the decree-holder himself to undertake the repairs. The decree-holder, I observe, declares it quite possible to restore the verandah and is supported in his opinion by evidence. At all events, he is willing to undertake the task, and as his family occupies the upper floor it may be presumed that he has some grounds for his opinion.

Anyhow, it seems quite clear that in building the strengthening wall, a wall that not only narrows the verandah but blocks up two windows and one door, which before were open, the judgment-debtor has contravened the decretal order.

The question remains whether the decree-holder is entitled to take matters into his own hands, or whether the judgment-debtor should be directed to re-build the verandah according to the plan.

Mr. Cowie for the debtor contends that the decree-holder has waived his right, that he looked quietly on from the 5th of May, on which date the month of grace expired, to the 28th of the month and allowed the debtor to incur heavy expense without remonstrance, and cannot now claim the privilege given him by the decree, time not being in any way the essence of that decree.

I am not prepared to assent to the latter proposition it appearing to me that time had a great deal to do with the arrangement; but as regards the waiver, I think that the judgment-debtor is entitled to succeed. Both parties live in the same house, and the decree-holder was of course perfectly aware of what was going on day by day before his eyes. He must have seen the wall building, the windows and door in process of being blocked up, and yet he allowed it all to go on and said nothing. I do not say that he was bound to come into Court the very day of the month's expiring, but if he chose to stand by and say nothing whilst his judgment-debtor was incurring considerable expense in doing what a competent possessional adviser told him was the only safe thing to do, I do not think that he is entitled to much consideration. He had the right to come in no doubt, and as the Judge says, he would have been entitled to have the decretal order carried out to the letter if he had demanded it in reasonable time. But a right may be waived, and under the circumstances I think that this right has been waived.

It is easier to decide on the points taken in special appeal than to say what is to be the result of this application. The debtor has, in my opinion, done what he ought not to have done, and the decree-holder has been undoubtedly injured by the blocking up of his light and air passages. But we are told that if the "status quo" be restored, the verandah can only be re-built at great risk, the present wall being old and weak. It is a difficult matter to decide, but it must be decided one way or the other, for the parties are to all appearance irreconcileably at feud and there is no hope of a compromise. The decision may, I think, be in this wise. If the debtor can arrange the strengthening wall so as not to block up light and air, or to prevent the decree-holder's ingress and egress, well and good; the work of re-construction can go on without change except as regards these matters, and the time allowed will be 3 weeks from the time the work is commenced, this being the time required by Messrs. Burn & Co. If this cannot be done, the debtor must carry out strictly the terms of the decree and re-build the verandah where it was before and in the same manner, having one month from date of commencement of the work given him for the purpose. If in doing this the decree-holder suffers from injury done to the upper apartments it will be his own fault, and he will have no claim to compensation or redress. Nothing can be decreed which is impossible of execution, and although the judgment-debtor as the original wrong-doer has no claim to be exempted from any consequence of his acts, still if in doing what the decree supposed to be possible and which the

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decree-holder declares is possible, damage is done to the premises, the debtor, after what he has done, ought to be held free from further liability. The Judge's order is modified to this extent, and under the circumstances of the case each party will pay his own costs. I may add that if the old verandah is to be restored as it was before, neglect of the judgment-debtor to finish it within the month ought to revive the decree-holder's right to take the repairs into his own hands on the terms contained in the original decree.

Kemp, J.—I concur.

The 9th June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Ijmalee lands—Lessee's rights—Growing Indigo.

Case No. 320 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 8th February 1871, *modifying a decision of the Moonsiff of Tegrah, dated the 28th November* 1870.

Mr. L. G. Crowdie (Defendant) *Appellant,*

versus

Bhikdharee Singh and others (Plaintiffs) *Respondents.*

Baboos Nil Madhub Sein and *Khettur Nath Bose* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Without the consent of the co-sharers a lessee of ijmalee lands has no right, in lieu of the ordinary crops which are capable of being profitably attached for arrears of rent, to grow the indigo plant, which is valueless except when converted into the manufactured article. Such a change of crops is tantamount to an entire alteration of the condition of the joint property.

Ainslie, J.—In this case, the plaintiff sues to restrain the defendant from growing indigo on lands which are the khood-khast lands of the plaintiff and on lands which are the ijmalee ryotee lands of all the joint proprietors in the village, which, the plaintiff alleges, defendant had attempted to cultivate by force. The plaintiff states his share to be 2 annas 15 gundahs in the whole village.

The defendant holds a lease of 1 anna 2 pie from one share-holder and 3 annas 17½ gundahs from another share-holder,—in all a little more than 5 annas.

The first Court gave a decree to the plaintiff.

The Lower Appellate Court has ordered a remand with a view to ascertain precisely what lands the plaintiff alleged to be khood-khast and what lands he alleged to be ijmalee.

In special appeal, it is contended that the suit ought not to have been entertained as no relief could be granted to the plaintiff without depriving the defendant of his just rights in the ijmalee lands, and that the special appellant was perfectly entitled to use and enjoy the shares of the lands leased to him in any way that suited him best; further that if the cultivation of indigo appeared profitable to him, he could not be restrained from growing it on the land by the other co-sharers, and that if any injury arises to the other co-sharers they have their proper remedy by an action for damages. If no immediate injury were likely to arise from the cultivation of the ijmalee lands with indigo, it would probably be advisable to leave the plaintiff to the remedy suggested; but it appears to us that there is an immediate injury in this way,—that the produce of the lands is hypothecated for the rent, and if the lands are cultivated with crops that are ordinarily grown upon them, those crops are such as the share-holders, if they have occasion to resort to the process of distraint for the realization of their rent, may profitably attach, but if in lieu of such ordinary crops, the crop of indigo be substituted, that crop becomes perfectly valueless to all but the particular persons who have the means of converting the plant into the manufactured article.

In a case reported at Volume X, Weekly Reporter, page 171, it was held by Mr. Justice L. S. Jackson as follows:—"A co-sharer in landed property has no right to do any thing which alters the condition of the joint property without the consent of his co-sharers." Here, it is quite clear that the use which the defendant proposes to make of the joint property is one which entirely alters its condition as

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regards the other co-sharers, and under that ruling he has no right to make this alteration.

In respect of the khood-khast lands, it is perfectly clear that the defendant can have no possible right. It has been objected that the Lower Appellate Court should not have remanded the suit. The plaintiff in his plaint has given no details of the lands, and merely comes into Court for a general declaration of the rights of the parties. The respondent's pleader eventually addressed us with a view to sustain that part of the judgment which directs a remand. But looking to the form of the plaint, we think that the remand was unnecessary.

Setting aside, therefore, the order of remand, we think that the order in this case must be that the defendant be restrained from growing or causing to be grown indigo on the *ijmalee* lands of the joint proprietors without the consent of all the proprietors, or without the consent of the ryots who hold tenures in the ijmalee lands; and that in respect of the *khood-khast* lands of the plaintiff, he be restricted from growing or causing to be grown indigo without the consent of the plaintiff.

We think the costs of this appeal should be paid by the special appellant.

The 9th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Registration in Collectorate—Limitation—Hindoo widow—Assam.

Case No. 1649 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Kamroop, dated the 13*th May* 1870, *reversing a decision of the Moonsiff of Burpettah, dated the* 18*th February* 1869.

Deepo Debia (Plaintiff) *Appellant,*

versus

Gobindo Deb (Defendant) *Respondent.*

Baboo Bhuggobutty Churn Ghose for Appellant.

No one for Respondent.

In a suit by a Hindoo widow for a declaration of right and title to dhurmuttur land of which she asserted she had always been in possession, but which defendant had got registered in his own name as well as in hers, and claimed to have been in possession of with his father since the death of the husband:

HELD that the entry of plaintiff's name conjointly with defendant's was a declaration of at least joint title such as nullified a plea of bar by limitation:

A widow under the Hindoo LAW is entitled to succeed to her husband's property and to have her name registered as proprietor.

The Hindoo LAW for Bengal Proper, that is, the Dyabhaga, is applicable to Assam.

Jackson, J.—THIS case was before this Court on a former occasion when it was remanded to the Lower Appellate Court, certain errors in law having been pointed out in its decision, and it was directed to make further enquiry into the case and to pass a fresh decision upon it. The suit was by the plaintiff as the widow of one Ram Deb for a declaration of her right and title to a certain piece of dhurmuttur land, which she alleged formerly belonged to her husband, and of which she asserted she had been always in possession, but which the defendant had got registered in his own name as well as in her (plaintiff's) name.

The defendant alleged that on the death of Ram Deb, his father succeeded to Ram Deb's property as his next of kin, and that he and his father had been in possession since Ram Deb's death, and that the plaintiff was not entitled to any portion of the dhurmuttur land.

The first Court came to the conclusion that the plaintiff and the defendant were each entitled to 8 annas of the land; that the property was family property and the grand-fathers of the parties had been brothers equally entitled to the land which devolved in equal shares on their descendants, the plaintiff's husband and the defendant.

On reviewing this decision, the Assistant Commissioner and Subordinate Judge of Burpettah has come to the conclusion that the plaintiff's claim is wholly barred by limitation. He finds that the plaintiff is actually residing upon a portion of the land and holds a portion of it in her khas possession; but he finds that the defendant has been managing the property for the last 30 years since the death of the plaintiff's

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husband, and he therefore considers that the plaintiff's title, if any, had lapsed under the law of limitation.

Upon this point this special appeal is preferred to this Court, and it has been pointed out that the decision of the Lower Appellate Court is evidently wrong, inasmuch as the very fact of this lady residing actually on this land and holding in her own sole possession a portion of it, is sufficient to prevent the bar of the law of limitation, at least as regards that portion of it which is in her khas possession. Then there is the other fact that the names of both the plaintiff and the defendant have been registered as proprietors of the land since the year 1264. Even though previous to those years the defendant's father's name alone had been registered, still such a change having been made with the assent of the defendant's father proves undoubtedly that the defendant's father admitted that his possession of the land up to that time had not been independent of and adverse to the plaintiff's right.

The entry of the plaintiff's name conjointly with the defendant's is a distinct declaration at least that the plaintiff was jointly entitled to this land with the defendant. It is impossible, under these circumstances, to understand how the Assistant Commissioner has come to the conclusion that the plaintiff's claim is barred under the law of limitation. We set aside his decision on this point.

There only remains then to consider the finding of the Assistant Commissioner on the merits. It was pointed out to him on the former occasion that he was wrong in stating that the defendant as a cousin of the plaintiff's husband was his next of kin, and that he was entitled to succeed to the plaintiff's husband's property, the widow only obtaining maintenance from him. It was pointed out to him that this was contrary to ordinary Hindoo Law. The Assistant Commissioner states in his judgment that although it may be the law in Bengal that a widow succeeds to her husband's estate, still that such is not always the Hindoo Law, inasmuch as under the Benares School in certain circumstances the widow has no right of succession to the husband's property. And I understand him to presume that it is possible it may not be the law in Assam.

It does not appear that any of the parties in this case asserted that the ordinary Hindoo Law did not apply: it does not appear that the Assistant Commissioner had any ground for saying that the ordinary Hindoo Law does not apply in the province of Assam. If the law differs in Assam, there must be some proof of that fact. It might have been distinctly pleaded, but it was not; and it might of course have been easily proved, but there was no attempt to prove it. It is quite true that the widow only obtains a life interest in the property and that she is unable to transfer it except for her life. But there seems to be no ground whatever for the presumption made by the Assistant Commissioner to the effect that the law in Assam differs from the ordinary law in Bengal.

The widow is under the Hindoo Law entitled to succeed to her husband's property, and is entitled to have her name registered as the proprietor of the land. The first Court seems to have gone very carefully into the rights of the parties, and that Court came to the conclusion that the plaintiff and the defendant are each equally entitled to 8 annas of the disputed land. There is nothing in the decision of the Lower Appellate Court upon which we can find that the first Court was in any way in error in arriving at that conclusion. We are, therefore, obliged again to set aside the decision of the Assistant Commissioner and to restore the decision of the first Court.

Each party will pay his own costs of this litigation.

Mookerjee, J.—I am also of opinion that the Assistant Commissioner is wholly wrong in dismissing the suit of the plaintiff. I cannot make out how the Commissioner thinks that the law of inheritance in Assam is different from the law prevalent in Bengal, *i. e.*, the law of the Dya-bhaga. The defendant never raised that contention and never pleaded that under either the Mitakshara or any other system of law he is a preferential heir to the deceased Ram Deb or that the widow is no heir-at-law. The plea put forward appears to be that inasmuch as Ram Deb had at the time of his death bequeathed his share to the defendant's father, the widow is not entitled to succeed. This is not a plea that the widow is not an heir according to the law prevalent in Assam, but it is quite consistent with the law of Bengal Proper, *i. e.*, the law of Dya-

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bhaga. The first Court found that the defendant has not been able to substantiate his allegation of a bequest, and therefore gave a decree of a moiety of the property to the plaintiff in right of her husband. Where the Assistant Commissioner got a different Hindoo Law for Assam is not at all clear to me.

I would also restore the decision of the first Court and reverse that of the Commissioner. Under the circumstances of the case, each party should pay his own costs throughout.

The 9th June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Evidence—Issues—Procedure.

Case No. 2247 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 13th August 1870, reversing a decision of the Moonsiff of that District, dated the 12th March 1870.

Muzboot Singh and others (Defendants) *Appellants,*

versus

Mussamut Chunder Mashee Kooer (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

In a suit for possession of a piece of land where defendant pleaded limitation and his witness unexpectedly disclosed that his possession was that of a mortgagee:

HELD that it was impossible for the Court to overlook that testimony and that it was its duty to frame an issue, find expressly on the fact of the mortgage, and provide for the rights of the mortgage; for if the mortgage was found to subsist in defendant, the plaintiff could not in this case recover a decree for possession but should be referred to a suit properly framed for redemption.

Jackson, J.—THE suit out of which this special appeal arises related to a 6 pie share of mouzah Jumalpore. It seems that the 4 annas share of that mouzah originally belonged to Digumber Singh, who died a great many years ago leaving a widow Balkoomar. This widow survived her husband for a very long time, and while in enjoyment of his property seems to have alienated a large portion of it, and amongst other things, she alienated to one Raj Koomar in the year 1842 her husband's share of the mouzah in question. It further appears that Digumber Singh's grand-nephew, Deokoomar, afterwards brought a suit to set aside various alienations made by Digumber's widow, and got a decree in respect of part of the property for which he sued, but did not obtain a decree in respect of mouzah Jumalpore. Being dissatisfied with that decree, he made an appeal to the High Court and obtained from the High Court a further decree, but mouzah Jumalpore was not included in his appeal; and he, consequently, obtained no relief as to that mouzah.

Raj Koomar, the alienee, had three sons, Dowlut Kooer, Bhugwan Dutt, and Oottum Narain; and it was in execution of a decree against Hurbunsee, the widow of Bhugwan Dutt, that certain parties including one Nuseeb Lall, plaintiffs' vendor, purchased her right, title and interest in the mouzah; and the plaintiffs allege that by conveyance from one of the three brothers, Dowlut Kooer, the other two, Bhugwan Dutt and Oottum Narain, became sole owners of the 4 annas share, and consequently Bhugwan Dutt's share became 2 annas, and that therefore what Nuseeb Lall purchased was one-fourth of two annas, or the 6 pie share to which this suit relates.

The defendant in this suit was one Daree Singh; and his allegation is that he has been holding the disputed share of this mouzah under a title, of which the origin is not disclosed, for the last 20 years; and he further alleges that he obtained from Deokoomar, the grand-nephew of Digumber Singh, a *ladavee* or ratification of his alleged title: he therefore alleges that plaintiff's suit is barred by limitation, and also that he, defendant, has a good title.

Upon this case going to trial the defendant's witness, Ram Pershad Lall, his own putwaree, seems to have very unexpectedly disclosed that the possession of the defendant was the possession of a mortgagee. The

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witness did not state, nor was it in any way proved, who granted the mortgage, when it commenced, or what the circumstances of it were.

The Moonsiff finding the allegation of mortgage to be correct dismissed the suit; but on appeal, the fact alluded to above coming out upon the evidence of the defendant himself, the Court below, considering the plaintiff's title to be proved, and also considering the possession of the defendant to have been of a character not adverse to the plaintiff's right, gave a decree to the plaintiff, observing, however, that it would not be prejudicial to the rights of the mortgagee: and that decree was stated to be one for proprietary possession.

Against this decision, the defendant has appealed specially. He contends that the plaintiff having sued to recover possession must prove that he or some person under whom he claims was in possession within 12 years of the commencement of the suit; and further (and this is the point upon which the most strenuous contention has been made) that the lower Court in finding, as it did find, that the defendant had been in possession as mortgagee, found something which was not alleged by either party, and consequently a matter upon which the parties were not at issue. It is also contended that the Court below wrongly construed the decree of the High Court.

As to the decree of the High Court, I think it quite clear the defendant is not entitled to rely upon it. Jumalpore was not included in the appeal, and consequently no relief was given in respect of Jumalpore; and of course Deokoomar, who never set up his title to that mouzah, was not competent to give any *ladavee* or otherwise ratify the defendant's title.

Upon the question of mortgage, I conceive that the lower Court could not shut its eyes to the evidence adduced by the defendant himself. When the defendant had shewn what the character of his possession was, it would be impossible for the lower Court to overlook that testimony and hold the plaintiffs to be barred. At the same time it seems to me that the result of the trial of his case is extremely unsatisfactory. If the decision of the Court below were to be considered as a judgment declaratory of the plaintiff's title, but refusing him possession on the ground of a mortgage subsisting in the defendant, that would be a finding that the defendant had a good and valid mortgage, and embarrassment might arise: on the other hand, if the decree be allowed to stand as it is, it would be a decree of which the plaintiff might be entitled to take out execution and obtain possession of the property. It seems to me that, upon the fact of mortgage being disclosed, as it was, by defendant's witness, it was the duty of the Court to frame a fresh issue on the subject of that mortgage to try whether there was any mortgage in the defendant, how it arose, by whom it was granted, and what the circumstances of it were, and to have found expressly upon the fact of mortgage and to have provided for the rights of the mortgagee.

I think, therefore, the decision of the lower Court must be set aside, and the case must be remanded to the Subordinate Judge in order that an issue may be framed upon this point and a decision given upon the facts which may be found.

It is quite clear that if a mortgage be found to subsist in the defendant, the plaintiff cannot in this case recover a decree for possession of the land, but must be referred to a suit properly framed for redemption.

Of course, it will be understood that it is quite open to the Subordinate Judge to find whether there is a mortgage or not. No issue was framed upon the point, and it is entirely open to the Court to find upon the issue which will be now raised.

I may also add that it does not appear that a clear finding was arrived at on the alleged sale by Deokoomar's son Dowlut of his share to his two brothers.

The plaintiff, who alleges that Bhugwan Dutt's share was 2 annas instead of something less, which it would be if that sale were not made out, must of course prove that fact.

Costs of the special appeal must follow the result.

Macpherson, J.—I concur.

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The 12th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Execution — Sale — Purchase by decree-holder.

Case No. 55 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Nuddea, dated the 7th January 1871.

Khellat Chunder Ghose (Decree-holder) *Appellant,*

versus

Keshub Chunder Paul Chowdhry (Judgment-debtor) *Respondent.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

Baboos Oopendro Chunder Bose and *Grish Chunder Banerjee* for Respondent.

Where the decree-holder is himself the purchaser at a sale in execution, there is no reason why he should not, instead of paying the price in cash, give receipts for the amount due to him under his decrees, supposing their value is sufficient to cover the amount for which the property is sold.

Loch, J.—LOOKING at the terms of the decree, it appears to us clear that the decree-holder, now appellant before us, is entitled to recover interest up to the date of realization of the amount of the decree, or in this case up to the date on which the sale of the property of the judgment-debtor was confirmed, provided that the whole sum does not exceed the amount of penalty awarded by the decree, namely, 40,000 rupees. We see that the sum of rupees 31,763 which is mentioned in the proceedings of the lower Court was the sum which was entered in the petition of the 3rd of April 1867 put in by the decree-holder when he asked for the sale of the judgment-debtor's property; and looking at the terms of the judgment, we see no reason why the interest should not be allowed to run from that date up to the date of the Judge's proceeding confirming the sale.

An objection in the shape of a cross-appeal on the part of the respondent has been raised to the proceedings of the Court below, to the effect that the Judge ought to have caused a re-sale of the property to be made, because the decree-holder who himself purchased the property, instead of depositing the purchase money in cash, paid the same by receipts for the amount covered by the two decrees held by him.

We do not think that this is a valid objection to the sale. There does not appear to us to be any reason why, if the decree-holder had decrees sufficient in their value to cover the amount for which the property was sold, he should not, instead of paying the purchase money in cash, give receipts for the amount due to him under his decrees; and as no material injury has been done to the judgment-debtor by the sale of his property, we think the cross-appeal should be dismissed with costs, and the appeal of the decree-holder as to interest should be decreed with costs.

Two gold mohurs will be allowed as pleader's fees both in this appeal and in the cross-appeal.

Mitter, J.—I concur.

The 12th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Attached property—Manager—Execution.

Case No. 115 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Gya, dated the 23rd February 1871.

Din Dyal Lall (Decree-holder) *Appellant,*

versus

Ram Ruttun Neogee (Judgment-debtor) *Respondent.*

Mr. R. T. Allan and *Baboo Nil Madhub Sein* for Appellant.

No one for Respondent.

The fact of a manager having been appointed to realize the profits of a property with a view to satisfy certain decrees (even though the appointment should have been confirmed by the High Court) is no bar to a Judge, on the application of another decree-holder, inquiring into the state of the property and passing proper orders, and, should he find that the proceeds are

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insufficient to satisfy all the decrees within a reasonable time, causing the decree to be executed in the usual way.

Loch, J.—We are of opinion that the Judge is in error in thinking that he cannot proceed with this case. It appears that on the application of certain decree-holders, a manager was appointed by the Subordinate Judge on the 8th January 1870 for the management of the property of the judgment-debtor and for the liquidation of the debts due to them. The petitioner now before the Court had a decree outstanding at that time; but, as we are told by his pleader, he did not consent to the appointment of the manager. On the 23rd August 1870 he obtained another decree for rupees 62,705, for which he took out execution on the 12th December 1870; but the Judge refused to proceed with the case on the objection of the judgment-debtor who stated that as a manager had already been appointed to take charge of his estate, and as from the profits thereof the debts due to all the decree-holders would be liquidated, the present decree-holder could not proceed against his, the judgment-debtor's, property: and the Judge considering that the appointment of the manager by the Subordinate Judge, which appointment had been confirmed by the High Court, prevented him from proceeding any further in the case, refused to take any steps to bring the property of the judgment-debtor to sale.

The petitioner states that he offered to show to the Judge that the profits of the estate of the debtor were quite insufficient to satisfy the decrees for the liquidation of which the manager was appointed, as well as the decree now in question, and also another decree which is the subject of an appeal to this Court, No. 114 of 1871; and that the Judge did not enquire into these points simply because a manager had already been appointed and his appointment was confirmed by the High Court. We do not think that the appointment of a manager in the other cases will necessarily prevent the Judge from enquiring into the state of the property. He can call upon the manager to show what are the profits of the estate; and if he find that they are insufficient, he may, notwithstanding the appointment of the manager, pass such orders as he may think proper. Of course, on the defendant's application the Judge may, if he think fit, also direct the manager now appointed to liquidate the amount of this decree.

The case will, therefore, be sent back to the Judge to consider the evidence produced before him, and to pass such orders as he think fit as to the enforcement of the decree, should he consider that the decree-holder is entitled to execute it. The appellant will get his costs of this appeal, the pleader's fee being assessed at one gold mohur.

Mitter, J.—I am of the same opinion. The order of the Subordinate Judge bearing date the 8th of January 1870 cannot be a legal bar to the present application, which is an application for the execution of a decree not covered by that order. Of course, it is quite open to the Judge to see whether the amount due under the decree now sought to be executed is likely to be realized, within a reasonable period of time, from the proceeds of the attached property; but in that case he would be bound to hear all the objections of the decree-holder and to give him sufficient time to produce evidence in support of those objections. Should the Judge, however, be of opinion that there is no probability of that amount being realized within a reasonable time from the proceeds of the said property, the decree-holder would be undoubtedly entitled to have his decree executed in the usual way.

If the present decision of the Judge were upheld, the decree-holder would have run the risk of seeing his decree barred by limitation, whilst the manager appointed under the order of the 8th of January 1870 is engaged in realizing the amounts due under the decrees to which that order refers.

The 13th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Date of suit—Amended or returned plaint.

In the matter of

Khellat Chunder Ghose, *Petitioner,*

versus

Nusseebunnissa Bibee and others, *Opposite Party.*

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Baboo Ramesh Chunder Mitter for Petitioner.

Baboo Doorga Mohun Doss for Opposite Party.

The date of a suit must be taken to be that on which the plaint was originally filed, and not that on which it was filed in another Court either as an amended plaint or as a plaint returned to be filed in that Court.

Kemp, J.—THIS is an application on the part of Khellat Chunder Ghose, who was the defendant in a suit brought by the opposite party under Section 15 Act XIV of 1859. The plaintiffs, the opposite party, brought their suit in the Moonsiff's Court valuing it at rupees 993 which would be within the jurisdiction of the Moonsiff. It was, however, found out by the Court or by the officer of the Court that the plaintiffs had made some clerical error in calculating the mesne profits and that on a proper calculation the valuation of the suit was more than rupees 1,000. The Moonsiff, therefore, under Section 30 finding that the amount or estimated value of the claim as stated by the plaintiffs was beyond the jurisdiction of his Court, returned the plaint to the plaintiffs in order to its being presented in the proper Court. The plaintiffs then presented the plaint in the Court of the Subordinate Judge, and the Subordinate Judge tried the case and gave the plaintiffs a decree.

It is now contended by the applicant that the Subordinate Judge had no jurisdiction to try the case, and that therefore his proceedings being without jurisdiction must be quashed. The ground taken is that when the suit was brought in the Moonsiff's Court, Act XXVI of 1867 was in operation, and that, under that Act, 20 times the net profits of the subject-matter of the suit would be the proper valuation, or rather that that would be presumed to be the market value unless the contrary was shown, but that when the plaint was presented in the Subordinate Judge's Court, Act XXVI of 1867 was no longer in operation and that the Act then governing the valuation was the new Court Fees' Act, Act VII of 1870, and that under Section 6 Clause 5 of that Act the valuation should be 15 times such net profits; that valuing the suit according to that standard the valuation would be under rupees 1,000, and therefore under Section 6 Act VIII of 1859 the suit ought to have been instituted in the Court of the lowest grade competent to try it, namely, the Moonsiff's Court, and that for these reasons the Subordinate Judge's decision must be held to be a decision passed without jurisdiction.

On the other side, it is contended by the pleader for the opposite party, who has been called upon to show cause, that although there are no decisions of this Court precisely in point, there are many decisions which the pleader called our attention to, which are to be found in Volumes III, V, VI, and VII of the Weekly Reporter, pages 207, 39, 157, and 20, which have held that the date of a suit must be taken to be that of the filing of the plaint originally, and that in calculating whether a suit is barred or not, the Court must look to the date when the plaint was originally filed, and not to the date when it was filed in another Court either as an amended plaint or as a plaint returned to be filed in that Court. The pleader also, and we think with some force, argued that if under the statute of limitation which is a very stringent law the Court has ruled on several occasions that the date of the filing of the original plaint is to be considered as the starting point, therefore, reasoning by analogy, the Court ought in this case to hold that the Subordinate Judge had jurisdiction inasmuch as at the time the original plaint was filed under the stamp law then in operation this suit was one which was not cognizable in the Court of the Moonsiff but was cognizable by the Subordinate Judge. He also brought to our notice that if the Court were to hold on a purely technical point of this description that the Subordinate Judge had no jurisdiction, the plaintiffs, the opposite party, would have no remedy under Section 15 Act XIV of 1859 inasmuch as any suit now brought under that Section would be barred.

We think on a careful consideration of the whole case, that we ought to apply the decisions quoted by the pleader for the opposite party, and rule by analogy that in this case the date upon which the suit must be assumed to have been filed was the date upon which it was put in originally in the Moonsiff's Court; and at that time there can be no doubt that the Subordinate Judge on the valuation under Act XXVI of 1867 had jurisdicton and the Moonsiff had no jurisdiction. We, therefore, think that it would not be right to set aside the decision of the Subordinate Judge and we discharge this rule with costs.

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The 13th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Judgment-debtors—Joint and several liability—Release—Contribution.

Case No. 110 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 4th April 1871.

Sheo Churn Lall and another (two of the Judgment-debtors) *Appellants,*

versus

Ram Surun Sahoo (Decree-holder) *Respondent.*

Mr. Mun Mohun Ghose and *Baboo Romesh Chunder Mitter* for Appellants.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondent.

The fact of a decree-holder giving a release to one or more of the judgment-debtors who were jointly and severally liable, cannot prevent his proceeding against the others for the balance due.

Any debtor paying more than his share is entitled to sue his co-debtors for contribution whether a release has been granted or not.

Loch, J.—THE objection taken in special appeal before us is that the decree-holders in this case, who had obtained a decree jointly and severally against certain debtors, have made an arrangement with two of the debtors and have given them a release under that arrangement; that consequently the decree-holders cannot proceed to realise the remainder from other debtors.

We see no sufficient ground for this objection to the execution. The mere fact that the decree-holders have realized a portion of the decree from one or two of the debtors who are jointly and severally liable, could not prevent their going against any of the others for the balance due to them; and even if they had, as stated in this case, given one or more of the debtors a release, yet that would not, we think, be sufficient to prevent their proceeding against the others to recover the balance due to them.

It has been urged that if the decree-holders be allowed, after having given a release to some of the debtors, to proceed against the others, there would be a difficulty, if a case for contribution were brought, in realising any sum from the other debtors who have been released.

We do not see how the action of the decree-holders can in any way affect the rights of the debtors as among themselves. If any debtor pays more than his share, he will, whether the decree-holders have or have not given a release to any of the other debtors, be entitled to go against his co-debtors for contribution.

We think, therefore, there is no ground for this special appeal, and accordingly reject it with costs.

Mitter, J.—I am of the same opinion. I do not see how the appellants in this case have been prejudiced by the arrangement they complain of. Of course, they are entitled to claim the full benefit of the payments made under that arrangement, as payments made in part satisfaction of the joint decree. But beyond this, I do not see any reason why they should be permitted to avoid their liability for the balance, when the decree-holder could have executed the whole decree against them if he had thought fit to do so.

The 14th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Reversioner—Cause of action—Legal necessity.

Case No. 48 of 1871.

Special Appeal from a decision passed by the Judge of Patna, dated the 2nd November 1870, *reversing a decision of the Subordinate Judge of that District, dated the 26th July* 1870.

Bisto Beharee Sahoy (Plaintiff) *Appellant,*

versus

Lalla Byjnath Pershad and others (Defendants) *Respondents.*

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Baboos Mohesh Chunder Chowdhry and *Hem Chunder Banerjee* for Appellant.

Baboo Debendro Narain Bose and *Moonshee Mahomed Yusoof* for Respondents.

In a suit by a reversioner to set aside a sale in execution of a decree against a Hindoo widow, plaintiff's cause of action depends on whether there was legal necessity for the widow's incurring the debt which burdened her husband's estate; if there was, the entire estate would pass; if not, her life interest only.

Glover, J.—THE plaintiff in this case sues for a declaration of his right to certain ancestral property as next reversionary heir, and also to have it declared that a sale of that property made in execution of a decree, in which the defendant became the purchaser, was invalid as against him, the reversioner.

The property in suit originally belonged to one Puriag Narain. Puriag died leaving a widow, Bhugwanee, and two daughters, Kishen Pearee and Luchmee Pearee. The plaintiff in this case is the son of the eldest daughter of Puriag Narain, Kishen Pearee, and consequently the grandson of Puriag Narain.

It appears that the widow Bhugwanee on the 15th of March 1858 took a loan of rupees 15,000 from three persons, Ram Nath, Bheekoo and Bulatun, on a zur-i-peshgee of the property now in dispute. Ram Nath assigned his interest in the zur-i-peshgee to one Munnoo Lall who, not being able to get possession of his share, brought a suit against the widow to recover the money advanced by him. He got a decree, and in execution of it the sale which is now the subject of dispute took place on the 3rd of August 1869.

The plaintiff's object is to have it declared that that sale is as against him, the reversioner, an illegal sale, not having been made for any of those necessities which the Hindoo Law allows.

The substantial defence was that there were such necessities, and that the sale was therefore a good sale.

The Court of first instance decreed for the plaintiff. The Subordinate Judge considered that no necessity had been proved and that the sale was not binding on the reversionary heir. He made an order, therefore, to the effect that possession under the sale should last only during the widow's lifetime.

The Judge, on appeal, without going into the merits of the case, decided that the plaintiff had no cause of action and that his suit ought never to have been registered. He held that as only the right title and interest of the widow, Bhugwanee, passed at the auction sale, and that such right, being the right of a Hindoo widow, was only a life interest, the plaintiff was not in any way endamaged and had no right to bring the suit. This decision appears to us wrong for the very simple reason that whether the plaintiff had or had not a cause of action, on account of the execution sale, would depend entirely upon whether the widow had at the time she incurred the debt which burdened her husband's estate such necessity for incurring that debt as the Hindoo Law contemplates. If she had, and if such necessity had been established, her right and interest would have included the entire estate which would have passed under the decree to the purchaser in execution; whilst if she had sold without such necessity, then all that would have passed under the sale would have been her life interest; and before it could have been decided whether or not the plaintiff had a cause of action, it must first have been decided whether or not there was any legal necessity for the widow to incur the debt.

The case, therefore, must be remanded to the Lower Appellate Court for a decision on this question. Costs to follow the result.

The 14th June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Section 10 Act VI (B.C.) 1862—Jurisdiction—Collector—Civil Court.

Case No. 1975 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 31st May 1870, reversing a decision of the Subordinate Judge of that District, dated the 17th July 1869.

J. P. Wise (Plaintiff) *Appellant,*

versus

Lakhoo Khan and others (Defendants) *Respondents.*

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Baboo Ram Churn Mitter for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

On an application to measure the lands of a particular estate, the Collector is not empowered by Act VI (B. C.) of 1862 to determine summarily the character of every holding upon that estate, but only to inquire how and by whom every portion of land therein is held, and what rent is payable in respect of such land.

In the event of a Collector's recording that particular tenants claimed to hold as mokurrureedars, a Civil Court would have jurisdiction to determine a title on which a cloud had been cast by his proceedings.

Jackson, J.—It appears to me that the Judge has improperly decided in this case that the Civil Court had no jurisdiction over it.

The provision of law on which he bases that decision is that part of Section 10 of the Bengal Act VI of 1862, which after declaring that in certain circumstances the Collector "shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable," towards the close of the Section states that "the decision of the Collector on all matters enquired into and determined by him under this Section, shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court."

It is supposed that in that sort of incidental way the Collector was empowered to determine finally, unless an appeal took place against his order to the Civil Court, the rights of all parties holding land in the estate which was to be measured, as between them and the zemindar; that is to say, that as the result of an application to measure the lands of a particular estate, the Collector should be empowered and required to determine summarily the character of every holding upon that estate.

It appears to me that the legislature meant nothing of the kind, but only meant to empower the Collector to enquire into the state of the facts, that is to say, how every portion of land in the estate was held, by whom held, and what rent was then payable in respect of such land. It might be proper for the Collector to record that particular tenants have claimed to hold as mokurrureedars, but I do not think he would be competent to determine whether they were mokurrureedars, or no. I think the Civil Court would have jurisdiction in such a case as this to determine a title on which a cloud had been raised by the proceedings of the Collector, and to try whether the defendant had a valid mokurruree or not.

I think, therefore, that the case must go back to the Zillah Judge in order that he may assume jurisdiction and try the case *de novo*.

Macpherson, J.—I concur.

The 14th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Measurement— Procedure — Section 10 Act VI (B. C.) 1862—Section 77 Act X of 1859.

Case No. 2353 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 21st June 1870, *reversing a decision of the Deputy Collector of that District, dated the 29th March* 1870.

J. P. Wise (Plaintiff) *Appellant,*

versus

Bansee Shaha and another (Defendants) *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Sreenath Doss, Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

Where the progress of a measurement under Section 10 Act VI (B. C.) of 1862 is interfered with by a third party claiming the land, the proper course for the Collector is to hold his hand leaving it to the parties to seek their remedy in the Civil Court.

The fact of a party's land having been measured under the provisions of the above Section, cannot take away his right to intervene under Section 77 Act X of 1859.

Loch, J.—We see no reason to interfere with the order passed by the Judge below. It has been urged before us that the order of the Judge is erroneous, because the lands for the rents of which the present suit has been instituted were measured under the provisions of Section 10 Act VI of 1862, B. C., and being so the assessment made by order of the Collector must be considered

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binding on the tenant, and consequently the plaintiff is entitled to recover. It is also contended that the lands having been assessed under Act VI of 1862, no one could be allowed to intervene in this case, and therefore the Court should not have heard the claim of the intervenor. It is further contended that the intervenor did appear during the time of the measurement; and though he claimed other lands which were given up to him, yet he did not lay any claim to this particular land.

Now, whether the intervenor did or did not appear at the time of the measurement is a matter of very little consequence as far as the present suit is concerned; because we do not see how the intervenor could under Section 10 have obtained any order from the Collector with regard to the land claimed by him. There is nothing in that Section by which the Collector is empowered to determine whether the land belongs to any particular estate or not. Therefore, in a case where the Collector finds that the progress of the measurement is interfered with by a third party claiming the land as belonging to his estate, the proper course for the Collector to take would be to hold his hand, leaving the parties to seek their remedy in the Civil Court. In this case, however, there was no intervention with regard to this particular land, but we do not think, because this land was measured under the provisions of Section 10 Act VI of 1862, B. C., therefore a third party cannot in the present suit for rent be allowed to intervene under the provisions of Section 77 Act X of 1859. It appears to us that it was never intended by the provisions of Section 10 Act VI of 1862 to take away the right which the law has given to parties to intervene under Section 77 Act X of 1859, or to take away the protection which it was intended to give to the tenants under that Section.

Under this view of the case, we think that the order of the Judge is perfectly correct. We therefore dismiss the special appeal with costs.

Mitter, J.—I am of the same opinion. There is nothing in Act VI of 1862 to prevent the respondent from appearing in this case as an intervenor under Section 77 Act X of 1859. There was no adjudication in the former case between him and the special appellant with reference to these lands, nor could there be any under Act VI of 1862.

The 14th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Alienations—Ground of necessity,

Special Appeals from a decision passed by the Subordinate Judge of Gya, dated the 23rd August 1870, affirming a decision of the Moonsiff of that District, dated the 31st December 1869.

Case No. 2691 of 1870.

Lalla Gunput Lall and others (Plaintiffs) *Appellants,*

versus

Mussamut Toorun Koonwar and others (Defendants) *Respondents.*

Baboo Ram Chunder Mitter for Appellants.

Baboo Nil Madhub Sein for Respondents.

Case No. 2694 of 1870.

Chumun Lall (one of the Defendants) *Appellant,*

versus

Lalla Gunput Lall and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Kalee Mohun Doss for Respondents.

The shrâdh of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are admitted by Hindoo law as legitimate grounds of necessity for alienations.

Kemp, J.—In No. 2691 the plaintiffs, and in No. 2694 the defendants, are special appellants. Taking the case of the plaintiffs first, No. 2691, the ground of appeal is this, that the Lower Appellate Court having found that the kobalah is invalid according to Hindoo Law, it should have decreed the petitioner's claim to the extent of declaring the sale as not sanctioned by law.

On turning to the decision of the Lower Appellate Court, we find that the Subordinate Judge has not distinctly declared that the conveyance executed by the widow was not binding beyond the widow's life, although he has found that that conveyance was executed for causes not allowable by the

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Hindoo Law; and if the Court had been disposed to confirm the judgment of the Lower Appellate Court, no doubt we should have had to modify that decision to this extent, namely, to declare that the reversioners were not bound by the conveyance executed by the widow; but on the appeal of the defendants, No. 2694, we think that the case must be remanded.

Before proceeding to give our decision upon that appeal, we may notice an objection taken by the defendants, namely, that the suit by the plaintiffs having been on the footing of asking for possession of the property conveyed by the widow and to oust the widow from possession on the ground of waste, and not containing any prayer for a declaratory decree to the effect that the alienation by the widow was not binding beyond her lifetime, that therefore the suit of the plaintiff ought to have been dismissed under the rulings to be found in the Special Number, Weekly Reporter, page 165, and Weekly Reporter, Volume VI, page 1. No doubt these rulings are to this effect that reversioners, who come in seeking to dispossess a widow and to obtain possession and who do not place their case also on the footing of obtaining a declaratory decree that the conveyance executed by the widow was not binding upon them beyond her life, as not executed for causes allowed by the Hindoo Law, should have their claims rejected under Section 15 Act VIII of 1859; but on reading the plaint in this case we find that although the plaintiffs did ask for more than they were entitled to, namely, to remove the widow from possession, they did ask for a declaration of right substantially, and therefore this objection is of no avail.

We turn to appeal No. 2694. The main ground and the ground upon which we think that we ought to remand the case is contained in ground No. 4, namely, "that the "Lower Appellate seems to have erroneously "held that there is no evidence of legal "necessities, and the reasons assigned by it "for invalidating your petitioner's deed of "sale are wrong in law." The first Court, a Hindoo Officer, in a very elaborate decision, found that the alienation by the widow was for purposes allowable by the Hindoo Law. He finds that the zur-i-peshgee made by the husband of the widow, the common ancestor of the parties, Khoob Lall, was paid off by the widow; that the shrâdh of Khoob Lall was performed by her; that the marriage expenses of Bâl Koowur, daughter of Khoob Lall, were provided by the widow; that the maintenance of the other plaintiffs was also provided for by the widow as well as the marriage of their children; and that all the disbursements on the above accounts had to be provided for by loans raised by the widow from the defendants. He also found that the plaintiffs are living in commensality with the widow and are colluding with her in order to render her acts not binding upon them beyond her lifetime. The first Court shows very distinctly that in the litigation which took place between the widow and the ticcadar, Rewut Sahoo, the widow had to institute proceedings in the Fouzdary Court before she could get rid of the ticcadar; that these proceedings were appealed to the Sessions Judge and that the widow did not get possession except on the footing that she was first to re-pay the amount of the zur-i-peshgee advanced by the ticcadar; then there was a suit in the Civil Court by the ticcadar against the widow, although that suit was dismissed; and he found also that the widow had herself to sue the ticcadar in the Civil Court, and that there were expenses incurred by the widow on that account, and although she got her costs in that suit still there were many expenses incurred in excess of the costs which the Court awarded to her.

This elaborate and careful decision of the first Court is disposed of by the Lower Appellate Court, a Mahamedan Officer, in as many words as there are pages in the first Court's decision.

The Subordinate Judge finds that because the widow got her costs in the litigation with the ticcadar awarded to her, it is absurd to say that she incurred any costs of her own in those suits. He also finds that any other necessity has not been proved because the Moonsiff had proceeded on imaginary grounds. We fail to see how the Moonsiff's grounds are imaginary, for he proceeds on grounds admitted by the Hindoo law to be grounds of necessity for such alienations, namely, the shrâdh of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payments of the husband's debts. All these grounds are acknowledged by the Hindoo law as legitimate causes for raising money by a widow, and they have been found to be proved by the first Court.

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The decision of the Subordinate Judge is so unsatisfactory that we take the case out of his hands and remand it to the Judge to be tried as an appeal from the Moonsiff's decision. Costs to follow the result.

The 15th June 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Co-sharers—Putnee lease—Lien—Priority.

Case No. 103 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 19th February 1868.

Dhun Kristo Sein and others (Defendants) *Appellants,*

versus

Messrs. Erskine and Co. (Plaintiffs) *Respondents.*

Baboos Rash Beharee Ghose and *Nil Madhub Sein* for Appellants.

Mr. R T. Allan and *Baboo Tarucknath Sein* for Respondents.

R as mortgagee sued the *Ds* for possession after foreclosure. A razeenamah and safeenamah were put in and a decree passed thereon under which the *Ds* and others as principals, and their co-sharers as sureties, bound themselves not to alienate any portion of their property in the estate till the debt was satisfied, and that on failure the decree should be executed, the shares of the principals being sold first. After this the co-sharers granted a putnee of a portion of the estate to the defendants in this suit. Subsequently the rights of the *Ds* were sold in execution to *B*, who again sold them to plaintiffs who had previously acquired 12 annas of the right and interest of *R* under the razeenamah and safeenamah and decree, the remaining 4 annas having passed to *G*, now represented by defendant *K*.

The present suit was brought to set aside the putnee lease as being in derogation of plaintiffs' rights.

HELD that the plaintiffs, to the extent of their share, had a valid lien upon the estate and were entitled to priority over any right under the putnee lease and to hold possession until their claim was satisfied.

Norman, C. J.—SREEMUNTO ROY, who was the mortgagee of some shares in a zemindaree called Lot Bhedia, brought a suit in the Civil Court against Huree Naraiu Dutt, Okhoy Chunder Dutt, and others for the possession of a portion of that zemindaree after foreclosure. Okhoy Chunder Dutt and his co-sharers appeared in that suit, and having agreed to pay the amount of the mortgage, executed a kistbundee in respect of their 7½ annas share of Lot Bhedia, consisting of 8 mouzahs. On the 9th Magh 1261, or the 21st January 1854, a razeenamah and safeenamah were put in upon the footing of which a decree was passed in a suit, by which it was stipulated that Okhoy Chunder Dutt, Oopendro Kishen Dutt, and others, the principals, and their co-sharers Unnoda Pershad Dutt and others, the sureties, bound themselves not to transfer any portion of Lot Bhedia either by gift, sale, or other alienation till the debt due to Sreemunto Roy and others should have been satisfied ; that on their failure to satisfy the debt, which amounted to 20,800 rupees, the decree should be executed and the property should be brought to sale, but that the shares of the principal debtors should be put up in the first instance, and the shares of the sureties should not be sold until after efforts had been made to realize the amount of the debt by the sale of the interests of the principal debtors.

After the date of the razeenamah and safeenamah and after the decree, on the 20th Pous 1266 the co-sharers granted a putnee of two mouzahs in Lot Bhedia to the defendants in this suit, Dhun Kishen Sein and others. Subsequently to the date of the putnee, on the 14th Assin 1271, the mortgaged property was brought to sale in execution of the decree. The rights of the Dutts were sold, and were purchased by Kylash Chunder Bhuttacharjee. Kylash Chunder Bhuttacharjee sold his rights and interests in the property so purchased to the plaintiffs in this suit, Messrs. Erskine and Co., who had previously acquired by purchase 12 annas of the right and interest of Sreemunto Roy under the razeenamah and safeenamah and decree by which a charge upon Lot Bhedia had been created in his favour, the remaining 4 annas having passed to Gooroo Prosunno Roy, now represented by Kalee Prosunno Roy, a defendant in this suit.

The present suit is brought by the plaintiffs who allege that the debt charged upon Lot Bhedia by the razeenamah and safeenamah has not been satisfied. The plaintiffs, therefore, bring this suit to set aside the putnee lease which they contend is in derogation of their rights.

It appears that the now plaintiffs brought a former suit against the same defendants based upon their right under the purchase of

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the mortgaged property by Kylash Chunder Bhuttacharjee in execution of the decree of January 1854.

That case came up in appeal to this Court, and it was then held that the plaintiffs' title as purchasers under the decree of 1854 was valid so far as regards 2 annas 13 gundahs 1 cowree 1 krant, the share of Okhoy Chunder and Oopendre Kishen, the original debtors, and that to that extent as such purchasers they were entitled to claim to set aside the putnee. But as regards 13 annas 7 gundahs 2 cowries and 2 krants, which was the share of Unnoda Pershad Dutt and others, the sureties, it was declared that the now plaintiff Erskine had not a good title as purchaser under that decree, inasmuch as the sale of the 19th September 1864 was a sale of the entire 16 annas of the property held by the Dutts in Lot Bhedia, contrary to the terms of the razeenamah and safeenamah by which it was provided that the rights and interests of the sureties should not be sold until after the rights of the principals had been exhausted for the satisfaction of the debt. The plaintiffs, therefore, having failed to establish a right as purchasers at the sale in execution of the decree, bring this suit to enforce their lien and right as mortgagees under the original razeenamah and safeenamah as against Dhun Kishen and others, the putneedars, who claim under a grant made by the mortgagor in derogation of their lien and right.

We think it quite plain that the lien having been once created by the razeenamah and safeenamah, nothing which subsequently took place has operated to divest the plaintiffs of the right so acquired.

We have, therefore, to declare that the plaintiffs, to the extent of their share, namely, 12 annas, out of 13 annas 7 gundahs 2 cowries and 2 krants treated as 16 annas, have a valid lien upon the estate in respect of which they are entitled to priority over any right of the defendants under the putnee lease granted to them in derogation of the plaintiffs' rights.

The decree of the lower Court will, therefore, be modified by declaring the rights of the plaintiffs as against the defendants to the extent of the share above-mentioned, and that the plaintiffs are entitled to possession as against the putneedars, and to hold such possession until the charge in their favour shall have been satisfied (that is to say, 12 annas of the amount now remaining due of the original debt, together with such interest as may upon a proper computation be found to be due) by execution of the decree of the 23rd January 1854, or otherwise.

The plaintiffs and defendants will respectively be allowed costs both in this Court and in the lower Court in proportion to the amount adjudged to the plaintiffs and the amount of claim disallowed.

The 15th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Rule nisi—Exparte application—Purchaser of a decree—Execution.

In the matter of

Brojo Coomar Mullick, *Petitioner*,

versus

Mon Mohinee Debea, *Opposite Party.*

Baboo Ashootosh Dhur for Petitioner.

Baboo Doorga Dass Dutt for Opposite Party.

Parties applying in the absence of the other side for the issue of rules *nisi* interfering with the rights of persons executing decrees, are bound fully and fairly to state all the circumstances within their knowledge which it is necessary for the Court to consider in granting the rule.

The purchaser of a decree under Act X of 1859 is entitled to ask the holder for a power of attorney to proceed with the execution.

Norman, C. J.—THIS was a rule obtained by Baboo Ashootosh Dhur on the 24th of March 1871, on behalf of the judgment-debtor in a suit under Act X of 1859, calling upon Mon Mohinee Debea, who appears to have taken an assignment of the judgment-creditor Unnopoorna Dassee's interests in that suit, to show cause within 10 days after service of the rule why an order of the Assistant Collector for enforcing the decree obtained by Unnopoorna should not be set aside on the ground that that order was illegal.

The point which the petitioner desires to raise is that a decree under Act X of 1859 cannot be transferred by sale. On the application for that rule, the applicant wholly

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omitted to state that a previous application had been made to this Court, which was dismissed on the 24th February of the present year.

We think that this alone would be a sufficient cause for discharging the present rule. Parties who come to this Court on statements of facts, in the absence of the other side, praying for the issue of rules which interfere with the rights of persons executing decrees are bound fully and fairly to state all the circumstances within their knowledge which it is necessary for the Court to consider in granting the rule. This is the principle which governs all applications for injunctions in English Courts.

In this case, there is not the smallest doubt that Mon Mohinee by her purchase of a decree under Act X of 1859 by private sale would be entitled to ask Unnopoorna, the holder of that decree, for a power of attorney either in favor of herself or of some body else on her behalf authorizing such person to proceed with the execution of that decree for her benefit. In the execution of the decree it would be a matter of the smallest importance whether the decree should be executed by Mon Mohinee herself or by her mooktear, or by Unnopoorna under her direction and on her behalf.

The present petition alludes to a right of set-off by Brojo Coomar Mullick, the petitioner, as against Unnopoorna Dassee. Without distinctly stating that the petitioner has a counter-claim which he is entitled to set-off as against Unnopoorna and the amount of that claim, the petitioner states that "there are claims as against Unnopoorna Dassee, and the object of the fraudulent sale is to recover the money decreed by the execution of the said decree in the name of Mon Mohinee Debea."

The petitioner does not state that the object of Mon Mohinee or Unnopoorna is to execute the decree in order to defeat his right of set-off. He does not state what that set-off is or put his case in such a definite form as to give Unnopoorna any opportunity of contradicting him or proceeding against him criminally for making a false statement.

The only conclusion we can arrive at is that this rule is an attempt to give effect to a mere technical objection for the purpose of preventing the execution from proceeding.

The 151st Section of Act X of 1859 provides that all orders passed by the Collector under this Act, not being judgments in suits or orders passed in the course of suits and relating to the trial thereof or orders passed after decree and relating to the execution thereof, shall be appealable to the Commissioner; and all such orders passed by a Deputy Collector shall be appealable to the Collector; but no judgment of a Collector or Deputy Collector in any suit, and no order of a Collector or Deputy Collector passed in any suit and relating to the trial thereof, or after decree and relating to the execution thereof, shall be open to *revision* or appeal *otherwise than as expressly provided in this Act.*

Reading this provision, it seems doubtful whether we have the power to make the order prayed. However that may be, we are sure that if we have the power to interfere we ought not to do so.

The application having been rejected, the applicant must be visited with costs; and considering that this is a second application, we think he must pay 3 gold mohurs to the opposite party.

The 15th June 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Deed of surrender (istifanamah)—Registration—Clauses 2 and 3 Section 17 and Clause 7 Section 18 Act XX of 1866.

Case No. 166 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Pubna, dated the 12th July 1870.

Bhyrub Chunder Dass and another (Plaintiffs) *Appellants,*

versus

Kalee Chunder Chuckerbutty and another (Defendants) *Respondents.*

Mr. J. W. B. Money and *Baboos Sreenath Doss* and *Greeja Sunker Mojoomdar* for Appellants.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

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An *istifanamah* or deed of surrender, surrendering pledged property of which the party executing it was in possession, on receiving back the amount of a bond debt, comes under Clauses 2 and 3 Section 17 of Act XX of 1866, and must be registered, to be admissible in evidence. "Acknowledgments" in Clause 7 of Section 18 refer to transactions of quite a different description.

Bayley, J.—We think the judgment of the lower Court in this case must be reversed and this appeal decreed with costs.

The plaintiffs sued for joint possession with mesne profits of certain lands on declaration of their miras pottah right, alleging that on the 10th Magh 1268 they acquired a 4 annas share of the disputed property from the defendant Kalee Chunder under two miras pottahs, and that they held possession of the same until the end of the year 1275, when they were dispossessed by the defendant.

The defendant Kalee Chunder denied such dispossession, and averred that on one occasion he borrowed from the plaintiffs rupees 350 on a bond and received as selamee rupees 400, altogether rupees 750; that he gave the plaintiffs a mowrussee pottah as security and that the plaintiffs executed to him an ikrar stipulating that if he (defendant) re-paid the whole amount principal and interest by the 30th Pous 1270, they (plaintiffs) would surrender him the aforesaid 4 annas; that accordingly the defendant did re-pay the whole amount to the plaintiffs, who gave him a receipt and executed an istifanamah surrendering the property to him, and that he is accordingly in possession. The words actually used in the deed of relinquishment are—"এস্তফানামা লিখিয়া দিয়া আমার সম্পত্তি আমাকে ছাড়িয়া দেওয়ায় আমি রিতিমত &c.," deed of surrender having written and given my property to me, having surrendered, I duly &c. It is necessary to give the actual words of the deed as it will be hereafter shewn that the decision of the lower Court proceeds in a great measure upon those words.

In this case, the original ikrar was not produced. It was said to be deposited with a certain mookhtear who said he had lost it, but who has not been examined. A duplicate of the deed was filed in the Registry Office and a true copy thereof produced in this case. On this, the lower Court has admitted the ikrar relying on the fact that both the deeds, *viz.*, the pottah and the ikrar, were presented for registration on the same day.

The lower Court further holds that the defendant has proved that the plaintiff had restored him to possession. That Court observes that the istifanamah did not require to be on stamped paper and that neither that document nor the receipt required registration. On the whole, the lower Court is of opinion that notwithstanding the evidence produced by the plaintiffs it was impossible for them to get over the ikrar produced by the defendant, and make the Court believe that they were dispossessed by the defendant.

The lower Court, accordingly, dismissed the plaintiffs' suit.

Probably, it would have been necessary to go fully into the evidence and into the question of the admissibility and the validity of the ikrar had not the case turned here entirely upon another point, *viz.*, the admitted non-registration of the istifanamah. It is at the same time admitted by both parties that the Registration Act No. XX of 1866 must govern the question as to whether the deed requires registration or not. Now, in Part III of the Act,—the Chapter on registrable documents,—Clause 2 of Section 17 is to the following effect:—"Instruments (other than an instrument "of gift) which purport or operate to create, "declare, assign, limit or *extinguish*, whether in present or in future, any right, "title or *interest*, whether vested or contingent, of the value of 100 rupees or upwards to or in *immoveable* property shall "be registered."

Clause 3 of the said Section is as follows:—"Instruments which *acknowledge* the "receipt or payment of any consideration "on account of the creation, declaration, "assignment, limitation or *extinction* of any "such right, title or interest shall be registered."

Then we come to Section 49 of the Act. That Section says:—"No instrument required by Section 17 to be registered "shall be received in evidence in any "civil proceeding in any Court, or shall "be acted on by any public servant as "defined in the Indian Penal Code, or "shall affect any property comprised therein, unless it shall have been registered in "accordance with the provisions of this "Act."

Now, the words used by the parties themselves in their own pleadings have been

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quoted above, and it is clear from them that by the terms ছাড়িয়া দেওয়া surrendering, and ইস্তফানামা deed of surrender of lands of which the other party was in possession, it was meant to *extinguish* the *interest* of that party in that *immoveable property*, and *acknowledge* the *extinction* of his right to that property. Under such circumstances, there can be no doubt that the deed comes under the provision of Clause 2, and as such must be registered.

It is then contended that if the above words in the deed amount to an acknowledgment, it would contemplate a case coming under Clause 7 of Section 18, and as such the registration is optional. On referring, however, to the words of that Clause and comparing them with the terms of Clauses 2 and 3, it appears to us clear that the "acknowledgments" in Clause 7 Section 18 are in respect to transactions of quite a different description than are contemplated by the istifanamah in this case; and if there is any doubt on that point we have simply to look to the words of the receipt and we find that what the parties contemplated was that the consideration on which the lands were to be surrendered, that is the interests of the party holding them, were to be extinguished. This was exactly the condition expressed by the words in the istifanamah. Under such circumstances, we think that the deed comes under Clauses 2 and 3 of Section 17 and must be registered, and without registration is not admissible as evidence in any Court under the provisions of Section 49.

It was at one time pressed on us that the defendant's case might be held good upon the general evidence irrespective of this particular document; but such a plea cannot be maintained, because it was to meet the plaintiff's case that the defendant, admitting the mowrussee jote and the pottah, still set up the special plea that the land was to be restored in consideration of the payment of a certain sum, *viz.*, rupees 400 and rupees 350, total rupees 750, and that the re-occupation of the land was the condition of that payment. The deed of surrender, therefore, was the main proof of the defendant's special plea, and until he can prove that special plea his case must fail.

In this view, we think that the decree of the lower Court must be reversed and this appeal decreed. The plaintiffs will recover possession of the lands in suit with wassilat, which is to be ascertained in execution, from the date of dispossession as alleged in the plaint to the date of the recovery of possession.

Paul, J.—I concur.

The 16th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Mortgage of moveable property—Suit for redemption—Jurisdiction.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 2nd May 1871.

Bhubotarinee Ghosany, *Plaintiff*,

versus

Juggernath Tewary, *Defendant.*

Where moveable property has been pledged in a mortgage bond as security for a loan, and the amount due on the mortgage is tendered but declined, the mortgagor's suit for possession will lie in the Small Cause Court. But if there has been no tender and the suit is for possession after ascertainment of defendant's lien on the property, the Small Cause Court has no jurisdiction in the matter.

Case.—THE question in this case is whether a suit for redemption of moveable property pledged as security for a loan in a mortgage bond, will lie in a Small Cause Court.

Plaintiff borrowed a sum of money from defendant pledging a buffaloe calf, by a mortgage bond in the nature of a deed of conditional sale, which stipulated that if the money was not re-paid by a certain date, plaintiff's title to the buffaloe should be at an end, and the defendant to whom the animal had been made over should be entitled to retain it. Plaintiff first brought a suit to recover the buffaloe on the ground that she had paid off the debt, which was dismissed, because she could not prove such payment.

She now brings another suit for possession of the animal and pays into Court the amount of the loan with what she conceives to be the proper amount of interest up to date of suit.

Defendant replies by pleading that the suit will not lie in this Court, and files an

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account of the expenses of feeding, herding, &c, to which he says he has been put, and which far exceed the sum paid in by plaintiff as due under the bond.

It does not seem to have been as yet decided by the High Court whether a suit for redemption will lie in a Small Cause Court, but the procedure prescribed by law for a person wishing to redeem seems to me to be inconsistent with the practice of Small Cause Courts, at least on the supposition that the same procedure will apply when moveable as well as immoveable property is concerned; and it would appear that the same procedure applies to both, neither the Hindoo nor the Mahomedan law making any distinction between mortgage of land and pledge of other property,—Macpherson on Mortgages, pp. 1-3, 5th Edition. The course to be pursued in the redemption of a mortgage by conditional sale, is laid down at page 135 *et seq.* of the same work. The mortgagor must tender to the mortgagee or deposit in Court the principal sum lent, with the stipulated interest. The deposit must be made in the *Dewanny Adawlut* of the city or zillah, *i. e.* the Court of the District Judge, who will serve a notice of the deposit on, and will pay the amount to, the mortgagee, on his surrendering the bill of sale or shewing sufficient cause why it cannot be surrendered. If the mortgagee has had possession, he may in certain cases be called on to account for the proceeds of the mortgaged property while in his possession.

If this procedure is applicable when moveable property has been mortgaged, I think it clear that a suit for redemption will not lie in a Small Cause Court. It is evident that the suit is not one for personal property simply, as it will also be necessary to investigate the amount due to the mortgagee on the bond, as well as the amount to which he is entitled for the keep of the buffaloe; and in this respect the case resembles that of Ram Gopal Shah, IX Weekly Reporter, 136, which, it was held, was not triable by a Small Cause Court.

I have, therefore, dismissed the case contingent on the High Court's opinion, to whom at the request of the plaintiff's pleader I refer the case.

The judgment of the High Court was delivered as follows by

Norman, C. J.—If the plaintiff had before the commencement of the suit tendered the amount due on the mortgage to the defendant or alleged that she had done so, we think that a suit for the possession of the mortgaged buffaloe would have lain in the Small Cause Court. The plaintiff's suit would have been for personal property to which she would have alleged that she had a right of possession from the time of the tender—a period antecedent to the commencement of the suit.

But there seems to have been no tender before suit in the present case. The plaintiff asks to have the amount of the defendant's lien on the buffaloe ascertained, and prays that on taking this amount the defendant may be compelled to deliver to her the buffaloe. It is something more than a mere suit for personal property. In fact, at the commencement of the suit—at the time of the filing of the plaint—the plaintiff had no right to the possession of the personal property which forms the subject of her claim.

The case referred to by the Judge of the Small Cause Court is closely analogous to that now before us.

The 16th June 1871.

Present:

The Hon'ble J. P. Norman, Officiating *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Sections 246 and 247 Act VIII. 1859—Fresh claim.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 21st March 1871.

Mohadeb Mundul, *Decree-holder*,

versus

Modhoo Mundul, *Judgment-debtor*, and Muddun Mundul and others, *Claimants*.

Where a claim under Section 246, Civil Procedure Code, is dismissed or struck off without adjudication, a fresh claim by the same claimant within a reasonable time may be entertained subject to the provisions of Section 247.

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Case.—In this case, a claim under Section 246 of Act VIII of 1859 was preferred by the claimant to the property attached, and in due course it was set down for hearing, but as claimant did not appear in person or by pleader when the claim was called on I rejected it, and the claimant has again filed a fresh claim under the Section cited, and the question arises whether it ought to be admitted or rejected.

I am unable to find any precedent in point, but in the matter of Khellat Chunder Ghose *versus* Bhuggobutty Churn Mookerjee, Weekly Reporter, Civil Rulings, Volume XIV, page 16, it was held that a Judge has no jurisdiction to try the same objector's claim under Section 246 of Act VIII of 1859 a second time as against the same attachment, or to re-open a question finally decided on the former occasion ; and I am inclined to think that when a claim has been rejected for whatever cause under the Section cited the claimant's remedy lies in a regular suit, and not in a fresh claim ; but as I have doubts in the matter I beg to refer the question for the opinion of the High Court.

The judgment of the High Court was delivered as follws by

Norman, C. J.—Section 246 contemplates that a claim to property which has been attached shall be disposed of either—

By an order for releasing the property from attachment, if it appear to the satisfaction of the Court that the property *was not* in the possession of the party against whom execution is sought, or of some other person in trust for him, &c.

Or, by disallowing the claim if it appear that the property *was* in possession of the party against whom execution is sought as his own property, &c.

If a claim is made and dismissed or struck off without any adjudication in either of the modes provided for by Section 246, and after such dismissal a fresh claim is preferred by the same claimant within a reasonable time, we see no reason why, subject to the provisions of Section 247, the Judge should not entertain such claim as a matter in dispute, which has not been heard or determined. Compare Cochrane *versus* Heera Lall Seal, VII Weekly Reporter, page 79.

The 16th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Servants—Dismissal—Wages.

Reference to the High Court by the Judge of the Small Cause Court at the Cantonment of Barrackpore, dated the 2nd May 1871.

Rughoonath Doss, *Plaintiff*,

versus

Mr. T. Halle, *Defendant*.

A dismissed servant is entitled to wages for any broken period during which he may have served, at the rate he was earning when dismissed.

Case.—The plaintiff claimed rupees 13-15-3 on account of wages, at rupees 9 per mensem for one month and 18 days, and rupees 17-13 for bazar expenses. The defendant stated that he had given the plaintiff a cheque for rupees 17 in payment of all demands for the one month, and pleaded non-liability on account of the 18 days wages on the ground that as the pay was not due till the end of the month, plaintiff could not demand his pay but ought to have brought an action for wrongful dismissal, and his advocate cited certain cases decided in England to this effect. Now, I am of opinion that as defendant was fully warned of the claim, such a mere technical objection cannot be accepted by this Court, which is one of equity as well as of Law. Servants in India never, I believe, claim compensation if the usual warning is not given, nor do they ever bring suits for wrongful dismissal. This is the custom of this place, and this Court has always decided in similar cases that a master, unless he can prove that the dismissal was justifiable, is liable for the pay of the broken period. I, therefore, wish to decide so in this case, but as I am doubtful whether the English Law quoted by defendant's advocate is applicable to India or not, I make this reference and beg the Honourable Judges' ruling on the point.

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The judgment of the High Court was delivered as follows by

Norman, C. J.—The plaintiff is clearly entitled to payment for the time during which he has served, according to the rate of wages which he was earning when dismissed.

The 16th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Suit for a share of arrears of rent—Jurisdiction—Section 29 Act VIII (B. C.) 1869—Limitation—Deduction.

Case No. 11 of 1871.

Regular Appeal from a decision passed by the Second Subordinate Judge of 24-*Pergunnahs, dated the* 30*th November* 1870.

Hurish Chunder Dutt and others (Defendants) *Appellants,*

versus

Sreemutty Jugodumba Dossee (Plaintiff) *Respondent.*

Mr. J. W. B. Money and *Baboos Kalee Prosunno Dutt* and *Khettur Mohun Mookerjee* for Appellants.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Motee Lall Mookerjee* for Respondent.

A suit against putneedars under Act X of 1859 to recover half the rent mentioned in their kubooleut having been dismissed on the objection that plaintiff's co-sharer had not been joined as co-plaintiff, and that the judgment having been upheld in appeal, plaintiff brought a fresh suit under Act X making the co-sharer a defendant. Defendants again objected that the question as to plaintiff's share being still open it could not be decided in the Collector's Court. This suit was also dismissed and the dismissal upheld in appeal. Plaintiff then brought her suit in the Civil Court.

HELD that Section 29 Act VIII (B. C.) of 1869 was not applicable to this suit, which was for a fractional share of certain arrears of suit after determination of a question raised by defendants for their own purposes and came under the ordinary Procedure Code Act VIII of 1859.

HELD that plaintiff was under Section 14 Act XIV of 1859 entitled to an allowance of the period during which she was *bonâ fide* prosecuting her claim in the Revenue Court which from defect of jurisdiction was not able to try it.

Norman, C. J.—THE plaintiff, Sreemutty Jugodumba Dossee, has brought this suit against Hurish Chunder Dutt and others, putneedars, and Sreemuty Puddo Monee Dossee, her co-sharer in the zemindaree within which the putnee of the first mentioned defendants is situate.

The plaint alleges that the Dutt defendants hold 15 mouzahs and kismuts in Pergunnah Noornuggur in putnee at an annual rent of rupees 9,066-10-8 according to a kubooleut executed by them in favor of the plaintiff's mother, Rash Monee Dossee; that as the first half-yearly rent for 1271 was not paid, the putnee was sold by auction under Regulation VIII of 1819; that on a suit being brought this sale was set aside and the Dutt defendants recovered possession with mesne profits. The plaintiff then brought a suit under Act X of 1859 to recover her share, *viz.*, one-half the rent mentioned in the kubooleut. The defendants objected that Sreemutty Puddo Monee Dossee, the plaintiff's co-sharer in the zemindaree, had not been joined as a co-plaintiff; that the plaintiff had come to no settlement with Puddo Monee in respect of her share, and that the defendants were ignorant of the extent of Puddo Monee's share. The suit was dismissed by the Collector and the judgment of the Deputy Collector dismissing the suit on that ground was ultimately upheld by the High Court on the 3rd of July 1868.

The plaintiff then brought a fresh suit under Act X of 1859 against the defendants for her moiety of the rent, making the co-sharer Sreemutty Puddo Monee Dossee a co-defendant. The co-sharer Sreemutty Puddo Monee Dossee did not appear or put in any answer.

The defendants again objected that the question as to the plaintiff's share being still open it could not be decided in the Collector's Court by making Puddo Monee a co-defendant.

This suit was also dismissed by the Deputy Collector, and the decree dismissing the suit was affirmed by the High Court on the 14th of April 1870 on the ground that the Collector's Court under Act X had no power to determine any question of right between the plaintiff and her co-sharer.

The present suit was brought in the Civil Court on the 31st of May 1870 for the

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plaintiff's share, *viz.*, one-half of the rents, from 1271 to 1276.

The Subordinate Judge made a decree in favor of the plaintiff for the amount of the plaintiff's share of the rent as claimed, rupees 27,200, but disallowed the claim for interest.

From that decision, the defendants have appealed in No. 11 of 1871.

Two points have been pressed on our attention by Mr. Money for the appellants :—

First.—That the plaintiff has not proved that her share of the rents is a moiety. But there is nothing in that objection. The defendant Puddo Monee Dossee had put in an answer admitting the plaintiff's claim to a moiety of the rents as co-heir with her on the death of Rash Monee, and the defendant Hurish Chunder Dutt who was examined as a witness says :—" On the death of Rash " Monee Dossee, her two daughters, the two " sisters Jugodumba and Puddo Monee " brought against us a suit for arrears of " rent and obtained a decree and they rea- " lized the money on one occasion." In another part of his examination he says :— " I knew at the time the former Act X suit " was going on that at the death of Rash " Monee her two daughters were her " heirs."

It is clear that the Subordinate Judge was quite right in saying that there was no dispute on this point.

The next question is whether the rent for the years prior to 1275 is barred by limitation.

The plaintiff having brought two successive suits for rent in the Collector's Court under Act X of 1859, the defendant objected successfully that as the plaintiff was entitled to and sued only for a moiety of the rents, the suit could not be maintained in the Collector's Court under Act X. The ground of that decision was that there had been no determination of the plaintiff's share, and no contract or engagement, either express or which could be implied from the conduct of the parties, on the part of the defendant to pay to the plaintiff an ascertained proportion of the original rent in respect of the share to which the plaintiff was entitled in the property held by the defendant in putnee.

The ruling of the High Court amounted in effect to a decision that a suit for a *share of an arrear or arrears of rent* by a person entitled to such share cannot be treated as a suit for an *arrear or arrears of rent* within the meaning of that expression as it stands in the 4th Clause of Section 23 of Act X of 1859.

The defendant, therefore, raised an objection which made it necessary for the plaintiff to resort to a suit in the Civil Court to enforce her rights.

The limitation for suits for the recovery of arrears of rent under Section 32 of Act X of 1859 would not have applied to a suit brought in the Civil Court upon a cause of action not cognizable under Act X of 1859. *See* Prosunno Coomar Paul Chowdhry *versus* Muddun Mohun Paul Chowdhry, XIII Weekly Reporter, page 390.

But it is supposed that the passing of Act VIII of 1869, B. C., may have made a difference.

I think that such is not the case. The suit is not a suit for *an arrear of rent* as that term is defined in Section 21 of Act VIII of 1869, B. C., but for a fractional share of certain arrears of rent, after the determination of a question raised by the defendant for his own purposes as to the share of which the plaintiff is entitled.

The suit has been brought as a suit not under Act VIII of 1859, but as a suit under the ordinary Civil Procedure Code, Act VIII of 1859. The period of limitation for such a suit is that prescribed by Act XIV of 1859.

If the decision of the High Court on the former appeals was correct, it would follow that Section 29 of Act VIII of 1869, B. C., would not be applicable to such a suit as that now before us.

The result is that in my opinion the lower Court was right in holding that the plaintiff was, under Section 14 of Act XIV of 1859, entitled to an allowance of the period during which she was *bonâ fide* prosecuting her claim against the defendants in the Revenue Court, which, from a defect of jurisdiction, was unable to decide it.

The appeal is dismissed with costs.

Ainslie, J.—I concur in the orders made by the Chief Justice in these three appeals.

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The material question in No. 11 is the question of limitation.

If the plaintiff could have maintained a suit under Act X of 1859, there can be no doubt that she would be bound by the provisions of Section 32 of that Act, but she tried to do so twice and on each occasion was defeated on objections raised by defendants. In the first instance she sued without making her sister a party to the suit, and the demand was contested on the ground that the defendants would not be safe if they paid any specified share to the plaintiff in the absence of any apportionment of the rent between her and her sister. In the second suit, she attempted to meet the objection by making her sister a party to the suit, but she was again defeated. The defendants in their written statement in that suit (para. 3) did not deny that plaintiff was entitled to a half share, but insisted that she was bound to get a decree of Court defining her right; and in the 5th para. they further go on to say "whether then the "*pro formâ* defendant Puddo Monee Dossee "objects to plaintiff's share or not, this "Court (the Collector's)not being empowered "to decide the matter by receiving proofs "of the extent of the shares, the present "claim of the plaintiff is evidently liable to "dismissal."

The whole contention of the defendants was that the suit would not lie in the Revenue Courts and they succeeded in carrying their point. They now turn round and contend that the suit would lie there and no where else. It seems to me that this objection does not come properly from their mouths and that they are bound by their own pleadings and the former decisions.

The 16th June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Damages — Magistrate's liability — Jurisdiction—Chapter XX, Criminal Procedure Code — Procedure—Irregularity—Voluntary defendants.

Case No. 44 of 1870.

Application for review of judgment passed by the Hon'ble Justices L. S. Jackson and A. G. Macpherson, on the 5th January 1870, *in Special Appeal No.* 1911 *of* 1869.*

The Collector of Hooghly on behalf of Government (one of the Defendants) Respondent, *Petitioner,*

versus

Tarucknath Mookerjee (Plaintiff) Appellant, *Opposite Party.*

Mr. Bell (The Legal Remembrancer) and *Baboo Unnoda Pershad Banerjee* for Petitioner.

Mr. J. W. B. Money and *Baboos Chunder Madhub Ghose* and *Sreenath Banerjee* for Opposite Party.

A suit for damages does not lie against a Deputy Magistrate acting judicially and within his jurisdiction.

A Deputy Magistrate has no legal authority to order the cutting of a bund, or otherwise to interfere with it, except by a proceeding held as prescribed in Chapter XX of the Criminal Procedure Code, under which he is bound to fix a day on which the owner of the bund may shew cause why it should not be cut, and to give him a full and fair opportunity of being heard and of protecting himself.

A proceeding under Chapter XX, if regular and such as the law prescribes, is a judicial proceeding. But mere irregularity or incompleteness of procedure, such as holding inquiry through the Police instead of conducting it personally, does not affect the jurisdiction of a Magistrate acting under that law, or render him liable to an action for damages.

A party who forces himself into a suit as defendant is as much a defendant in all respects as if he had been originally named a defendant by the plaintiff, and if issues raised by him as between himself and plaintiff are properly tried, the judgment thereon will bind the parties whatever be the judgment on the original question between the plaintiff and those whom he sued.

Macpherson, J.—THIS is an application made on behalf of Government for a review of our judgment in special appeal No. 1911 of 1869, delivered on the 5th of January 1870.*

* 13 W. R., p. 13.

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On the special appeal, we held that the plaintiff was entitled to recover damages from the defendant Ishur Chunder Mitter, in respect of an act done by him in his official capacity as Deputy Magistrate of Jehanabad. We also held that the plaintiff was entitled to a declaration of his right to erect and maintain a certain *bund*, as against Ishur Chunder Mitter, and also as against the Government. The Deputy Magistrate having contended before us that he was protected by Act XVIII of 1850, we were of opinion that he was not protected by it, inasmuch as in cutting the plaintiff's *bund* (the act complained of) he did not proceed with due care and attention, and therefore did not act "with good faith" within the legal meaning of that term.

The only ground of review on which we have heard the petitioner, is that indicated in the first and second paragraphs of the written "grounds" annexed to the petition of review. It is, that our judgment is defective because we do not decide whether the Deputy Magistrate in removing the *bund* acted judicially and with jurisdiction. It is argued that if the Deputy Magistrate was acting judicially and within his jurisdiction, we ought to have decided that he was not liable in a suit for damages, whatever may have been the irregularity of his proceedings.

We are prepared to admit that if the Deputy Magistrate in cutting the *bund* was acting judicially and within his jurisdiction, this suit against him ought to have been dismissed, so far as he is concerned.

We also admit that we have not decided distinctly whether the Deputy Magistrate acted judicially, or whether he acted with jurisdiction. That we did not decide these points, however, arose from the fact that we were never asked to decide them, and that they were never alluded to in the argument of the special appeal. The sole question then raised was whether the Deputy Magistrate acted *bonâ fide* so as to be protected by Act XVIII of 1850. We decided that he did not act *bonâ fide* and was not so protected. But it was not suggested by those who appeared for the Deputy Magistrate and the Government, that whether acting *bonâ fide* or not, the Deputy Magistrate (so long as *mala fides* was not alleged) was protected on the general principle that the act done was a judicial act done by him with jurisdiction.

The particular defence now relied on is not distinctly raised in the written statements put in by the Government and by the Deputy Magistrate respectively, nor in the issues fixed for trial in the lower Courts. No doubt, the non-liability of the Deputy Magistrate because his act was a judicial act, has been pleaded in general and comprehensive terms. But it was never pleaded expressly, that because the act was judicial and done with jurisdiction, the Deputy Magistrate was not liable, however irregular his procedure.

The Judge of the Lower Appellate Court has found that the act was a judicial act done with jurisdiction. But he did not decide the case in favor of the Deputy Magistrate on that ground: indeed it may be doubted whether it ever occurred to him, any more than to the defendants, that that was in itself a sufficient defence: his decision rests mainly on the ground that the Deputy Magistrate acted *bonâ fide*.

We have allowed the question to be raised now in review, because, as the Lower Appellate Court has found that the act was a judicial act done with jurisdiction, our judgment is no doubt defective as it omits all mention of this matter.

We have in our original judgment shown that the proceedings of the Deputy Magistrate were so careless and irregular that he could not be held to have acted *bonâ fide* within the meaning of Act XVIII of 1850. The precise point now taken is that when he cut the *bund* he was acting under Section 308 and the other Sections of Chapter XX of Act XXV of 1861; that the act was a judicial act done with jurisdiction; and that the Deputy Magistrate is, therefore, protected however irregular his proceedings may have been.

The Lower Appellate Court has not only held that the Deputy Magistrate had jurisdiction and acted judicially, but has also held in substance that he acted under Chapter XX of Act XXV of 1861. The Judge says:—"Under these circumstances, "it appears to me that the Deputy Magis-"trate was acting in a matter in which he "had jurisdiction to pass an order which, "if not appealed against, would be defi-"nite, and therefore he acted judicially. "He does not quote the Section of the "Law under which he acted; but it is "urged on his behalf that the orders were "passed under Chapter XX of the Criminal "Procedure Code. I have no doubt that "his order in this matter was irregular and

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"illegal. * * * * * It seems to me that "he did not consider it necessary under Chap-"ter XX to examine evidence * * * *."

Mr. Money for the plaintiff contends that the Deputy Magistrate did not act under Chapter XX; that even if he did, he had no jurisdiction to cut the *bund* without following strictly the provisions of that Chapter (*i. e.*, that the following the procedure prescribed by that Chapter was essential as a foundation for the jurisdiction claimed); that a Deputy Magistrate acting under Chapter XX is not acting judicially; and that, at any rate, under the peculiar circumstances of this case, the Deputy Magistrate acted so irregularly and improperly that he cannot be held to have acted judicially.

There is unquestionably some evidence to support the conclusion at which the Lower Appellate Court seems to have arrived that the Deputy Magistrate was, as a matter of fact, acting under Chapter XX of Act XXV of 1861. We, therefore, cannot interfere with that finding in special appeal. But whether under the circumstances the Deputy Magistrate acted judicially, and whether he acted with jurisdiction, are matters of law rather than of fact.

As the plaintiff relies on the irregularity and recklessness of the Deputy Magistrate's proceedings as evidence that he was not acting judicially and within his jurisdiction, it is necessary to examine those proceedings in detail. They are only partially stated in our original judgment: and we shall therefore now state all that occurred, so far as it is to be gathered from the confused mass of papers which constitute that which is said to be the record of the Deputy Magistrate's proceedings.

The Overseer's report of the 15th January, in which he states that the water penned back by the plaintiff's *bund* was rising and injuring the Government embankment, &c., consists of a memorandum written by the overseer in his day book, kept by him, in English, in his official capacity as Ferry Fund Overseer.

The Deputy Magistrate's order of the 17th January that the Police were to give orders to the parties interested to cut the bund, &c. is not a formal order, nor is it (so far as we have been able to discover) anywhere recorded in the Deputy Magistrate's office as a proceeding under the Criminal Procedure Code, or under any other law. It is merely a memo. or order written in the margin of the overseer's book.

The overseer's report was as follows:—"Proceeded to Hurringkola to inspect works "on the old Benares road, and found that "the construction of the earthen bridge "over the Mundesharee has become difficult "as the upper embankment of the river has "been cut open since three days, which "made the water increase to the height "of 8 or 9 feet. The work will be too "expensive unless the lower embankment "of the river is cut open to drive the sur-"plus water. The cost estimated at first "was rupees 80; but now I think it cannot "be completed without the expense of "rupees 200 and upwards. I report the "matter for your consideration and orders."

Opposite this, the Deputy Magistrate writes in English—"Orders to be issued to "the Police to carry a notice to the party "who has erected the *bund* below to cut "it and allow the water to pass, so as not "to injure the bridge near Hurringkola."

On the 6th of February, the Police reported that they had given notice as directed.

Thereupon, on the 11th of February, two petitions were presented to the Deputy Magistrate. They were similar in purport, claiming a right by user or custom to erect the *bund* for the purposes of irrigation, and praying for an enquiry. They were presented, the one by Sheikh Danis and other ryots of the plaintiff,—the other by Modhoosoodun Pandah, the plaintiff's kurpurdaz or agent.

On the same 11th of February, the Deputy Magistrate wrote an order on the back of the petition of Sheikh Danis, directing the petition to be sent to the police, who were to enquire as to the custom.

The report of the overseer of the 20th February is written by him in English in the day-book which we have already mentioned;—"In order to have sufficient water "for the *Baro* cultivation, Baboos Taruck-"nath Mookerjee (the plaintiff) of Jonai, "Chundee Churn Ghose of Haitpore, Gopee "Mohun Mozoomdar, naib of late Baboo "Ramapershad Roy, and Huree Churn "Mookerjee of Ooterparrah, dammed the "river Damoodah and turned its course so "that the water may run to their cultiva-"tion through the Saidpore and Singhal

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"khals. But these khals, having open com-"munications with the river Mundesharee "made the water of the river Damoodah run "to it and thereby inundated its parts; and "the earthen bridge lately constructed over "it for the convenience of the passengers, "bullocks, and carts, has been plunged to the "depth of three feet, though the bridge "was constructed three feet above ordinary "water level. The bridge will come to no "use unless the surplus water is driven off "by cutting away the lower embankment, for "which an order was issued on the police "on the 15th ultimo; and should the Ma-"gistrate return to Hooghly by that way, "he shall have to undergo a good deal of "inconvenience for the crossing of his "horses, &c. I report the matter for your "consideration and orders."

On the 23rd February, the Deputy Magistrate made, on this report, another memo. in English, written on the margin of the overseer's book;—"Injunction to be issued "through the police on the persons who "have thrown up the cross *bunds* below the "bridge, to let off the water so as to relieve "the bridge of the super-abundant waters."

By way of giving effect to this order, the Deputy Magistrate apparently issued an order on the 26th February to the Police in the following terms (we use the word "apparently" because the only copy of this order on the record bears neither signature nor seal of the Deputy Magistrate). "Formerly, *bunds* were erected on the "Mundesharee for *Baro* cultivation, but the "water used to remain lower than the Hur-"ringkola embankment; now, however, "there are super-abundant waters. The "Police will instruct the persons who erect-"ed the *bunds* to cut them down in such "manner that the excess waters may pass "off."

The Police on the 5th March reported service of this order.

On the 9th of March the Police Inspector reported that, on enquiry, he found that the plaintiff had no right by use or custom to erect his *bund*, but that Chundee Churn, the Goldigree talookdar, *had* a right, by custom, to erect a *bund* lower down the river at Gobra.

On the 11th March, a petition was presented by Talib Ali Moollah, agent of the said Chundee Churn and another. The petition first states that the Goldigree people had a customary right to erect a *bund* lower down this khal for the purpose of securing water for the *Baro* crop, and that recently the plaintiff had constructed a *bund* to which he had no customary right and had thereby prevented the water from reaching the Goldigree *bund*, and caused much loss to the Goldigree ryots. The petition then continues:—"Moreover, the erec-"tion of the non-customary (*be-mamoolee*) "*bund* (plaintiff's) has caused the Gov-"ernment *bund* at Hurringkola Ghat and "the Benares road to be overflowed with "water, and has thereby done great incon-"venience to the public at large. This "matter having been reported by the Ferry "Fund Overseer, the Mookerjee talookdar "(the plaintiff) was ordered to let the water "run out, but has not cut his *bund* on several "excuses, &c." The prayer of the petition was that the plaintiff's *bund* should be ordered to be removed.

On the back of this petition, the Deputy Magistrate on the 11th March made an order to the following purport,—"Ordered "that Suttroghun Ghose, mookhtear of the "opposite party, be apprized of this, and "that notice be issued to his clients direct-"ing them to cut this *bund* within a week, "if it is (*be-mamoolee*) not a customary "*bund*; but if they knew it to be customary "(*mamoolee*) let them show cause within "that period; and that a *perwannah* be "issued upon the overseer, Kally Prosunno, "directing him to enquire and report "whether the new *bund* erected by the "Court's order at Hurringkola is still "under water for the above reason; if so, "is it still after the issue of the previous "order; and if not now, how long was it "so after my previous order."

An order to the overseer, of the same date, after stating that it appeared from the petition of Talib Ali Moollah, that the Government bridge was suffering from plaintiff's *bund*, continues:—"You are hereby directed "to go and enquire and report whether the "Government bridge still continues under "water owing to that *bund*, and whether it "continued under water after passing the "first order to cut it; and if so, for how "many days."

On the same 11th of March, a notice was issued to the plaintiff to this effect:—"It "appears from the petition of Talib Ali "Moollah, kurpurdaz of the Goldigree

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"talookdar, that you have erected a new "*bund* at Bheotia, which is too much in-"juring the *Baro* crops of many ryots. "Take notice by this to cut the *bund* "within 7 days, if you know it be not cus-"tomary (*be-mamoolee*), or show cause "within that time if you know it to be "customary (*mamoolee*)."

On the back of this notice is endorsed a receipt on the part of the plaintiff of the 4th Chyet 1273, B. S., corresponding with the 16th March 1867, shewing that it was served on that day on him. And there is on the record a return by the Police, dated the 18th March, shewing that the order of the 11th had been served, but not stating on what particular day it had been served.

On the 19th, the overseer reported that the Government embankment was still submerged and that the *bund* had not been cut.

On the 20th March (that is to say, four days after the service of the notice of the 11th calling upon him to shew cause within seven days) the plaintiff by his agent, Modhoo Soodun Pandah, presented a petition to the Deputy Magistrate alleging the report of the Police as to the plaintiff's right to the *bund* to be false and made in collusion with the Goldigree people, and praying for a local enquiry by the Deputy Magistrate himself.

On the same day, Sheikh Sona-oollah and others, ryots of the plaintiff, presented a petition much to the same purport, saying that if the *bund* was cut the crops of five or six villages would be destroyed, and praying that the Deputy Magistrate would go to the spot and judge for himself.

On the 30th of March, the Deputy Magistrate seems to have made a variety of orders. The principal one, which is written on the back of Talib Ali Moollah's petition of the 11th March, is to the following effect:—"All "the papers on the subject being perused "this day, it is ordered that summons be "issued on the owners of the Bheotea *bund* "calling upon them to appear on the 27th "March next, on a charge of disobedience "of order and of causing mischief to the "Government *bund* by allowing the water "to stand upon it after the issue of the "order: that orders be issued to the Police "through the order book directing them to "send in the names of those persons who are "aware that the same order was not carried "out: that a *perwannah* be issued to the "overseer, Kally Persaud Mookerjee, direct-"ing him to furnish a list of such persons "who know that there was water upon the "Government *bund* after the issue of the "former order: that both of the Police and "overseer be written to to send in the lists "called for within two days: that both the "overseer and the Police do go to the spot "and cut the Bheotea *bund* in such a way "that the water runs off about one foot "down the Government *bund* and no more; "and if the defendant had cut the *bund* and "the water had already gone down one foot "of the Government *bund*, then they should "not cut the *bund* any more. If it now be "necessary to cut the *bund*, then the Police "should regularly realize the expense from "the defendant. Let both parties know that "this order is passed only with regard to "the Government *bund*. As to the Gol-"digree *bund*, let summons be issued upon "the overseer to appear as a witness on the "date fixed for its trial; and a copy of the "overseer's report of the 19th March be "kept with the case, and a copy of this or-"der be kept with the original record."

A copy of this order appears upon the back of the petition of the 11th February of Modhoo Soodun Pandah, the plaintiff's agent; and this copy also bears the signature of the Deputy Magistrate with the word "copy" above it. On what date this copy was written on the back of that petition does not appear.

In our original judgment it is stated that it was on or about the 11th February that the Deputy Magistrate directed criminal proceedings to be taken against the plaintiff for disobeying his order, &c. This direction, however, was not given till the 20th of March.

On the back of Talib Ali Moollah's petition of the 11th March is further to be found an order of the 20th March to the following effect:—"As a different date is "fixed with regard to the Hurringkola *bund* "it is necessary also to deal with regard to "the Goldigree *bund* separately: therefore, "it is ordered that the 27th of March be "fixed for its trial: and let mokhtears Sut-"troghun Ghose and Bykunt Nath Roy be "directed to produce any evidence they "have on that day." An order in similar terms and of the 20th March, is also endorsed on the petition of Modhoo Soodun Pandah of the 19th March.

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There seem also to have been several other orders issued on the 20th of March, *e. g.*, one to the overseer and one to the Police to cut the *bund* and realize the costs (if any) of so doing, and a summons to the plaintiff's agent to appear on the 27th to answer a criminal charge of disobedience to the Deputy Magistrate's order and causing mischief, &c.

We may say here that although we speak of the Deputy Magistrate having ordered the plaintiff's *bund* to be cut, we are aware that the order given was only an order to cut it to such an extent as was necessary to relieve the Government embankment. But it has been found by the lower Courts that the carrying out this order necessarily led to the destruction of the *bund*. We, therefore, speak of the Deputy Magistrate having ordered the *bund* to be cut, though we acknowledge the fact that the order he gave was restricted in its terms.

On the 24th of March, the Police reported that they had cut the *bund* the previous day. At the same time they forwarded a list of witnesses who could speak to the *bund* not having been cut in compliance with the previous order to cut it, and of these witnesses the Deputy Magistrate ordered that four should be summoned to appear on the 27th, for which day the criminal case against the plaintiff's agent (for causing mischief and disobedience of lawful orders) was fixed.

On the 26th of March, the Police made a return that they had summoned four witnesses.

On the 27th March, the trial took place. Modhoo Soodun Pandah, the plaintiff's agent, was the defendant. He denied having caused mischief under Section 426 of the Penal Code, but admitted having disobeyed the order to cut the *bund*. The Deputy Magistrate, finding him guilty under Section 188 of disobeying lawful order, fined him 50 rupees. These criminal proceedings against Modhoo Soodun Pandah do not necessarily bear directly upon the issues in the present suit; but they have been filed as evidence and are in the *nuthee*. We shall only say that they are a fitting corollary to the rest of the proceedings of the Deputy Magistrate,—being equally irregular and indefensible.

These details more than confirm the opinion which in our original judgment we expressed of the conduct of the Deputy Magistrate. He had no legal authority to interfere with the plaintiff's *bund*, except by a proceeding with reference to it held as prescribed in Chapter XX of the Criminal Procedure Code. He was bound under that Chapter to fix a day on which the plaintiff might shew cause why his *bund* should not be cut, and to give him a full and fair opportunity of being heard and of protecting himself. This being his duty, we find that on the 17th of January the Deputy Magistrate, having no evidence before him, and acting only on a report written by the road overseer in his day book, ordered the *bund* summarily to be cut. This order is contained only in a memo. in the overseer's book: no formal proceeding was held or recorded anywhere: but it was communicated to the plaintiff by the Police in the shape of a *perwannah*. On the 11th of February, the plaintiff and others, objecting to the *bund* being cut and claiming a prescriptive or customary right to erect it (which right both the lower Courts have found the plaintiff really has), and asking for an inquiry, the Deputy Magistrate, instead of inquiring himself into the matter referred it to the Police to inquire into the alleged right. On the 23rd of January, upon another private report made by the overseer in his book, the Deputy Magistrate,—still without any formal proceeding,—again writes an order in the margin of the overseer's book, directing the *bund* to be cut. And on the 26th of January, he orders the Police to see this order carried out, although at that time, no return had yet been made to the order directing the Police to inquire as to the existence of the prescriptive right claimed. On the 9th of March, the Police reported against the right claimed. On the 11th, the Goldigree talookdar prayed that the plaintiff's *bund* might be cut, because it injured the petitioner's *bund* lower down the river, and because it injured the Government bridge. Notice was then given to the plaintiff to cut the *bund* in seven days, or if he claimed a customary right to erect it, to shew cause within seven days. This notice was not served on the plaintiff until the 16th. On the 20th, the plaintiff's agent did shew cause by putting in a petition, asserting his customary or prescriptive right to erect the *bund* and praying a local examination by the Deputy Magistrate himself. On the 20th March, without in any way disposing of the plaintiff's claim of right, and with absolutely no further grounds to go on than

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the Police report and the overseer's reports (which last at any rate were made behind the plaintiff's back), the Deputy Magistrate ordered the *bund* to be cut at once, and peremptorily desired the overseer and Police to carry out this order. At the same time he fixed a day for trial of the question, as between the plaintiff and the Goldigree talookdar, of the plaintiff's right to erect the *bund*.

Mr. Bell, who has argued in support of his application for review with much ability and care, says that there were two separate matters pending before the Deputy Magistrate,—*firstly*, a question between the Government and the plaintiff, and *secondly*, a question between the Goldigree talookdar and the plaintiff. There is not the smallest indication that there was anything of the sort until the 20th of March. On that day, certainly, while the Deputy Magistrate made one order directing the *bund* to be cut, he made another fixing the 27th for trying what is called the Goldigree case. The fact of the Deputy Magistrate on that day making two separate orders, in no degree alters the position of the plaintiff. The plaintiff claimed, up to the 20th March, the right by custom or prescription to maintain his *bund*, as it was, against the Government and against the Goldigree talookdar. His claim cannot be altered nor his legal position damnified, because the Deputy Magistrate on the 20th chose to say (as he did practically say) "I dispose of the plaintiff's "case as against the Government by order-"ing his *bund* to be cut forthwith; but as "regards the question between him and the "Goldigree talookdar, I fix the 27th as the "day upon which they may fight out their "dispute." The Deputy Magistrate may, on the 20th of March, have separated the dispute between the plaintiff and the Government, from the dispute between the plaintiff and the Goldigree talookdar. But his having done so does not improve his position in the present suit, as no such separation existed until the 20th March, and it then sprang into existence through the spontaneous act of the Deputy Magistrate which is in no way binding on the plaintiff. There is nothing whatever in the notice to the plaintiff of the 11th March (served upon him on the 16th) to cut the *bund* or shew cause within seven days which indicates that that notice related only to the claim made by the Goldigree talookdar. On the contrary, the notice on the face of it relates generally to the plaintiff's right to maintain his *bund* as it was; and any one on whom it was served had a legal right to shew cause within the prescribed time, both as against the Government and against the Goldigree talookdar.

Mr. Bell further says that there was no case to inquire into as against the Government; that there was no doubt about the right; and no question save as to whether the Government *bund* was being injured. The Deputy Magistrate did not choose, any more than Mr. Bell, to recognize the possibility of any right as against Government. But as a matter of fact, the customary right to erect the *bund* was asserted from the first by the plaintiff, and it is not the case that the plaintiff's only point was that his *bund* was not injuring the Government road.

Such being the details of the proceedings of the Deputy Magistrate, Mr. Money very justly complains of the difficulty of finding out on what supposed principle the Deputy Magistrate acted as he did, and whether or not he acted judicially and whether or not with jurisdiction.

To this hour, the Deputy Magistrate himself has never got any nearer a justification of his conduct than a sweeping allegation made by him in the witness box, that he acted under the provisions of the Criminal Procedure Code "*and in the exercise of his judicial and executive powers.*"

The Government, in their written statement, say for the Deputy Magistrate that which he never has ventured to say for himself,—that some of his proceedings were made under Section 62 and others were under Chapter XX of the Criminal Procedure Code. The Court of first instance held that all the proceedings were under Section 62 and were taken by the Deputy Magistrate in his executive capacity. The Judge of the Lower Appellate Court held that all the proceedings were judicial and under Chapter XX.

In the absence of any indication by the Deputy Magistrate himself of the law under which he imagined himself to be acting, it becomes important to consider the line of defence adopted in this suit, and the course generally which the suit has taken since its institution.

The first paragraph of the plaint states that the *bund* was cut "by an unlawful order"

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of the Deputy Magistrate, and further on the plaint states that the third defendant, the overseer, reported that a large sum of money would be required for the construction of the bridge on the Government road unless the plaintiff's *bund* was cut, "and although your petitioner's (plaintiff's) "agent raised objections on that point, the "first defendant (the Deputy Magistrate) "instead of instituting a thorough enquiry "into it by the appointment of a *Punchayet*, "&c., passed an order on the 20th March "1867, for cutting open your petitioner's "(plaintiff's) prescriptive (*mamoolee*) *bund*, "in excess of the powers vested in him by "virtue of his office."

The words quoted are taken from a translation of the plaint by the Court Translator. This translation is considered by us (after hearing the original read) to be correct, and to give the true meaning of the Bengalee words used. Mr. Bell and the Government pleader, Baboo Unnoda Pershad Banerjee, however, allege that according to the real meaning of the plaint the omission to appoint a *Punchayet* is the only excess of power or jurisdiction complained of, and that the plaintiff did not mean to say that the Deputy Magistrate committed any illegality save in not summoning a *Punchayet*. We take the plaint as rendered by the Court Translator; and we do not doubt that the allegation in the plaint that the Deputy Magistrate exceeded his legal powers was not intended to be restricted, and is not in fact restricted, to the one matter of the not appointing a *Punchayet*.

However this may be, it is perfectly clear that the plaint was not read as so limited by those who prepared and filed the written statement on behalf of Government. And no one who takes the trouble to read that statement, can for one moment believe that there is the smallest foundation for the assertion made more than once in the argument of this application, that the Government was misled by the plaint and considered that the only point to be met was that as to the *Punchayet*. The issues fixed and tried in the Courts below, also show that the case was not treated by any of the parties as so limited. And when Government appealed to the Judge from the decision of the Court of first instance, this matter was not alluded to in the grounds of appeal which were filed.

To return to the proceedings subsequent to the plaint.

The Deputy Magistrate in his written statement filed on the 8th of April 1868, says:—1*st*.—That inasmuch as it is alleged that he acted in his official capacity, Government ought to be made a party. 2*nd*.—That as it was not alleged that he acted in *bad faith* the suit would not lie, according to the latter portion of Section 38 of Regulation XI of 1822 and Act XVIII of 1850. 3*rd*.—That he acted under a general order of the Magistrate, and the Magistrate should be a party to the suit. 4*th*.—"It has been "said that I acted beyond my powers only "in not having appointed a *Punchayet*. But "the law which provides for the appointment of a *Punchayet* also provides that the "party objecting should apply for it. No "such application was made." In the fifth and last para. the Deputy Magistrate gives his version of what occurred, in very general terms, not showing under what particular law he acted or meant to justify, save that he contends in a general way that he acted in good faith and did nothing illegal.

On the 26th May, the Collector of Hooghly on behalf of Government filed a petition praying that the Government might be made a party. This petition states that the plaintiff had sued the Deputy Magistrate "for having exceeded his powers and cut a bund;" that it had been represented to the Court that the Deputy Magistrate had "acted in connexion with "the cutting the *bund* in his judicial capacity, and consequently the suit cannot "lie," but the Court had done nothing as to making the Government a party. Then it goes on:—"The Deputy Magistrate passed "orders in connexion with cutting the *bund* "either in his judicial or executive capacity, "and in either case the Government ought "to appear." The Government prayed to be made a party and to be allowed to file a written statement. On the 29th of May, the prayer was granted notwithstanding the opposition of the plaintiff.

Thereupon, on the 27th of July 1868, the Collector of Hooghly on behalf of Government put in a written statement. It is in English, and too long for us to give it in full; but the following is its general purport:—

Firstly.—Government denies the plaintiff's prescriptive right to erect a *bund* as

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claimed by him, and pleads that the Mundesharee is a natural water-course and therefore cannot be the subject of any right injurious to the public. *Secondly*, Government says that the plaintiff's allegations that his *bund* did not injure the public road are false, and facts are stated to show that they are false. *Thirdly*, Government states that the convenience of the public requiring a temporary bridge, the Deputy Magistrate, under general instructions of the District Magistrate, directed the Ferry Fund Overseer to construct the Government bridge, in January 1867. It appeared, however, that the plaintiff's *bund* was certain to cause injury to this bridge, so the Deputy Magistrate ordered the plaintiff to remove it. This order was not attended to, and the Government bridge was constructed at additional cost in consequence. On the 20th of February, the overseer reported an overflow of the Mundesharee and submersion of the Government bridge by reason of the plaintiff's *bund*, and the Deputy Magistrate again ordered the plaintiff to cut the *bund*. On the 11th February the plaintiff's gomashta and some ryots presented a petition to the Deputy Magistrate, objecting to the order and demanding an enquiry, and an enquiry was accordingly ordered. Meanwhile, a servant of the talookdar of Goldigree complained to the Deputy Magistrate that the plaintiff's *bund* illegally prevented water reaching the Goldigree *bund*. The Deputy Magistrate thereupon ordered a fresh notice to issue to the plaintiff to cut the *bund*, or show cause within a week why it should not be cut. *In the meanwhile, as the overseer reported that the bridge was still submerged, the Deputy Magistrate ordered the bund to be partly cut, &c.*,—and it was cut. "Under these circumstances the Government pleads" that "the Deputy Magistrate "acted *judicially within his jurisdiction in* "*good faith, believing that he had juris-* "*diction*;" that the orders issued on the reports of the overseer were *in effect* orders under Section 62 of the Code of Criminal Procedure; that the order of the 11th March on the petition of the Goldigree talookdar was in *effect* an order under Section 308; that the plaintiff did not apply for a Jury, but for an inquiry; that the order for cutting the bund was also issued *under the spirit* of Section 314; and that under these circumstances, the suit was barred by Act XVIII of 1850. It was also pleaded that if it be admitted for argument's sake, that the Deputy Magistrate acted in his executive capacity, he acted for the public safety and welfare, &c.; and further that the right claimed by plaintiff was of such a large and comprehensive nature as would extinguish the ordinary rights and uses of the public thoroughfare and cause danger to traffic and human life, &c., a right inconsistent with all law and precedent.

It is to be observed that in this statement, Government pleads, not what the orders of the Deputy Magistrate *were*, but only what they were "in effect." The orders issued on the reports of the overseer (which include, according to the written statement, the actual order to cut the *bund*) were *in effect* orders issued under Section 62, but the order of the 11th March on the petition of the Goldigree talookdar was *in effect* under Section 308, while it is added that the order to cut the *bund* was also issued "under the spirit" of Section 314. Doubtless it was a difficult matter for the advisers of Government to justify the proceedings of the Deputy Magistrate who did not know how to justify them himself. That the difficulty was keenly felt is very apparent, from the vagueness and uncertainty of the justification pleaded in the written statement,—the only distinct line of defence taken on that part of the case being that the Deputy Magistrate acted in good faith and was therefore protected by Act XVIII of 1850.

The issues on which the case went to trial are set forth in the judgment of the Court of first instance:—"Is the suit barred "by Section 38 of Regulation XI of 1822 "and Act XVIII of 1850? Has the plain- "tiff all along erected the disputed *bund* to "keep the water for the cultivation of *Baro* "paddy in his talook, and did the defendants "having cut the *bund* in the manner de- "scribed in the plaint, cause the alleged in- "jury to the crops? Or, was the *bund* cut "in good faith in order to prevent inconve- "nience in the use of the public road, and "has the plaintiff sustained no loss thereby? "If the defendants did so in good faith in "the discharge of their official duty, are "they liable for the plaintiff's claim? and "if so, which of the defendants is liable?

"Did the Deputy Magistrate defendant "receive any order from the Magistrate to "cut the *bund*?

"Is the river Mundesharee a natural "water-course? And if so, can the plaintiff

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"claim a prescriptive right to erect a *bund* "in it?

"Is the act of the Deputy Magistrate "justifiable under the circumstances?"

At the trial, the Deputy Magistrate was examined as a witness, but approached no nearer to a legal justification of his acts than to declare that he ordered the *bund to be cut under the provisions of the Criminal Procedure Code and in the exercise of his judicial and executive powers.* The Court of first instance held that the Deputy Magistrate acted in good faith and not beyond his jurisdiction, and that under Section 62 of the Criminal Procedure Code he had jurisdiction to order the *bund* to be cut. The Subordinate Judge says in his judgment—"As the Deputy Magistrate "did the act carefully in his executive capa-"city, and it is not proved that he did not "act in good faith, therefore under Act "XVIII of 1850 neither he nor those act-"ing under him can be liable in damages." Finally, the Subordinate Judge says—"If it "be considered that the said act was beyond "the Deputy Magistrate's jurisdiction, yet "when the defendants believed him to "have jurisdiction they cannot be liable. "* * * * The plaintiff's prescriptive "right to erect the disputed *bund* is declared "and the claim for damages is dismissed, and "in the circumstances of the case each party "will bear his own costs."

There were no fewer than four separate appeals to the Judge from this decree. The plaintiff appealed as a matter of course, his claim for damages having been dismissed. The Government appealed, being dissatisfied with the declaration of right which the plaintiff had obtained. The Deputy Magistrate and the Ferry Fund Overseer also appealed. Each appealed separately and entered a separate appearance in the Judge's Court.

The Judge has in substance, though in rather an undecided manner, found as we have already said, that the Deputy Magistrate acted in good faith, judicially, with jurisdiction, and under Chapter XX of the Code of Criminal Procedure. His judgment ends thus:—"The order of the lower "Court must be modified, and the plaintiff "be declared entitled *quoad* the present "defendants to erect a *bund* in the river, "whereby the irrigation of the fields for "*Baro* grains in the villages in the plaint is "secured, with the reservation that chan-"nels be cut in the banks of the river "within three feet of their top, to allow the "exit of the water to prevent it overflow-"ing the river banks: that the claim for "damages be dismissed: and that the lower "Court's order declaring the plaintiff's pro-"prietory right in the river be set aside. "On the question of costs, as the plaintiff "has not succeeded in his special claim for "damages against defendants 1, 2, and 3 "(the Deputy Magistrate, the Overseer, and "the Police Inspector) he shall be made "liable for their costs in both Courts in pro-"portion. The Government defendant will "pay its costs in the Appellate Court and "recover costs from the plaintiff in the "lower Court in proportion * * *."

Against this judgment the plaintiff appealed specially to this Court.

As to Mr. Money's contention that an officer acting under Section 308 and the other Sections of Chapter XX is not acting judicially, even if he proceeds regularly, we are clearly of opinion that a proceeding under Chapter XX, if regular and such as the law prescribes, is a judicial proceeding. Our view of the duties of officers acting under that Chapter has been stated in our judgment now under review. It appears to us, that under Chapter XX a Magistrate cannot legally act without first calling on the person with whose property he proposes to interfere, to appear and show cause. If cause is shewn, the Magistrate must deal with it judicially, must take evidence if necessary, and come to a decision upon the whole matter. He has to summon, hear and determine, and has a discretion to exercise: and this is certainly a judicial power, and the officer exercising the power and acting as the law prescribes, will, on general principles, be protected though he be only a Deputy Magistrate (See Kemp *versus* Neville, 31 L. J., C. P., 158; Ferguson *versus* Earl of Kinnoull, 9 Clark and Finnelly, 290).

In the case of Ashburner *versus* Kishno Valad Tukee Patil, 4 Bombay Reports, page 150, A. C. Jur. (which seems to be an authority directing in favor of the present plaintiff) it was held by a Division Bench of two Judges of the High Court at Bombay (the Chief Justice Sir Richard Couch being one) that proceedings under Section 308 are not judicial within the meaning of Section 404 of the Criminal Procedure Code. And the like opinion was expressed more recently, although the question was not immediately before him, by Sir Richard Couch,

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in the course of his judgment in the case of Abbas Ali Chowdhry *versus* Illim Meah (XIV Weekly Reporter, p. 46, Criminal). In that case, a Full Bench of four Judges (the fifth Judge, Phear, J., dissenting) held, as we think rightly, that an order passed under Section 62 is *not* a judicial proceeding within the meaning of Section 404. Notwithstanding the opinion which has been expressed by the learned Chief Justice, we look upon proceedings under Section 308 and the following Sections as wholly different in principle, as well as in detail, from proceedings under Section 62 : and we cannot say we have any substantial doubt that a proceeding under Chapter XX, if regular, is a judicial proceeding for the purposes of the present suit. We think it must necessarily be held to be so, if the matter is to be determined according to the principles approved of in the two cases of Kemp *versus* Neville, and Ferguson *versus* Earl of Kinnoull, to which we have already referred.

There is, however, the further point,—whether, supposing the act would have been a judicial act if the procedure prescribed in Chapter XX had been followed, it can be said to be so in this particular case when that procedure was scarcely in any respect observed.

Mr. Bell, in trying to re-open this part of the case and to show that the rules prescribed in Chapter XX were sufficiently followed, relied much on the case of Alla Buksh (XII Weekly Reporter, page 24, Criminal). That case, however, even if it be accepted as a sound decision, is very different from the present. The defendants were served with a notice to remove certain tanneries as being a nuisance and injurious to health, &c., or to appear and show cause why they should not be removed. The notice was issued on the report of the Civil Surgeon, who carefully examined each separate tannery and made a report upon it. The persons to whom the order of the Magistrate issued, "appeared and showed "cause against it, and they attempted to "satisfy the Magistrate that the order was "not reasonable or proper. The Magistrate, "accordingly, went himself to the spot and "was satisfied that these tanneries should "be removed, and therefore confirmed his "order." It being objected that the proceedings of the Magistrate were not legal because he did not record evidence, the Court (E. Jackson and Dwarkanath Mitter, J. J.) declined to interfere, saying that it did not appear that the defendants had asked the Magistrate to examine witnesses and that he had refused to do so. The case does practically decide that a proceeding under Chapter XX may be legal though not supported by evidence on oath, if the Magistrate does in fact inquire fully into the matter and gives the parties a full opportunity of showing all the causes that they desire to show. But the whole circumstances of this case are very different from those of the matter now before us : and the gist of the present case is that the Deputy Magistrate did not inquire fully or give the plaintiff a fair opportunity of showing cause.

Although we consider it clear that the procedure prescribed by Chapter XX was observed as little as it could well be by any body acting under that Chapter at all, still, as the Deputy Magistrate did, as the Lower Appellate Court finds he did, in fact act under Chapter XX, and did call upon the plaintiff to show cause, and did hold a sort of inquiry (however irregular) through the Police, we do not think we can say that the Deputy Magistrate was not proceeding judicially. We think he was proceeding judicially, though carelessly and irregularly.

Then, was the cutting of the *bund* an act within his jurisdiction? We take it for granted that it was, if he had proceeded regularly under Chapter XX. But does the irregularity or incompleteness of this procedure so affect the matter, that the jurisdiction did not attach? For the same reasons which induce us to hold that the proceeding was a judicial proceeding, though irregular, we hold that the Deputy Magistrate was acting with jurisdiction. As the Deputy Magistrate, acting on the report of the overseer, considered it necessary that the *bund* should be removed, and as he under Section 308 passed an order calling upon the plaintiff to remove it, or show cause to the contrary within seven days, and as there was in fact a species of enquiry through the police, we think that the jurisdiction attached and that the Deputy Magistrate cannot be held to have acted without jurisdiction.

On the whole, as we must accept it as a fact that the Deputy Magistrate in cutting the *bund* was acting under Chapter XX of the Criminal Procedure Code, we are of opinion that he did act judicially and with jurisdiction, and therefore that he ought not

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in this suit to have been held liable in damages to the plaintiff.

When this application for review came on to be heard in Court, we were under the impression that it was the application of the Deputy Magistrate, as well as of the Government. Mr. Bell repeatedly spoke of the Deputy Magistrate as his client: and there is no doubt that the whole matter was argued throughout in the belief on the part of the Court, of Mr. Money, and of Mr. Bell, that the Deputy Magistrate joined in the application. It appears, however, that the petition of review is that of the Government alone. We labored under a mistake in supposing that the Deputy Magistrate joined in it.

A very curious state of things thus arises. The Deputy Magistrate, of whose conduct alone the plaintiff complained and against whom alone he got a decree for damages, remains quiet and does not seek to disturb our judgment: but the Government, a mere volunteer in the suit, against whom the plaintiff made no complaint and sought no relief, comes in and applies for a review on the ground that the Deputy Magistrate might have had judgment in his favor if he had justified his acts in a manner in which he never did justify them, and if he had relied on a defence on which he really never did rely. The position is manifestly absurd: and if it is to be dealt with strictly, there is no doubt that the application for review must be rejected wholly. Under the circumstances, however, we think we ought not to deal strictly in this matter. There is no question that the intention, throughout, was to apply for a review on behalf both of the Deputy Magistrate and the Government; and that the argument upon the application was conducted on the footing that the Deputy Magistrate was a petitioner for review.

We propose, therefore, even now to allow the petition of review to be amended by adding the Deputy Magistrate's name as a petitioner, if he prays that it may be so amended. Having so amended the petition, we shall reverse our decree of the 5th of January 1870 so far as it affects the Deputy Magistrate; and reversing the decrees of the lower Courts also so far as they affect him, shall dismiss the plaintiff's suit as against the Deputy Magistrate altogether.

While, however, we grant the review so far as concerns the Deputy Magistrate, we shall not grant it so far as it regards the declaration of the plaintiff's right as against the Government, to maintain the disputed *bund*. The issue as to the right to erect the *bund* having been fairly raised and tried between the Government and the plaintiff, there is no reason why the plaintiff should now be deprived of the benefit of the decree which he has obtained declaring his right as against the Government. As regards the Deputy Magistrate, the suit was against him personally for damages. If any question of right to the *bund* could be properly raised against him at all (which it probably could not), it could be so only as incidental to the main issue, that of his personal liability for the consequences of his illegal act. If the Deputy Magistrate's defence had been conducted with reasonable care and skill, he would have declined all issues as to title, on the ground that they were immaterial: and he would have merely pleaded that he was acting judicially with jurisdiction, and was therefore not liable. The Deputy Magistrate as a private individual (in which capacity alone he was sued) was in no way interested in the plaintiff's title: and we think that when the suit fails so far as its object is to establish his personal liability, it must also fail so far as its object is to obtain incidentally a declaration of title or right as against him.

But the position of the Government is very different. The Deputy Magistrate appeared to defend himself, and the Government had really no interest one way or other in the suit. Doubtless, the Government might properly have undertaken the defence of the suit for the Deputy Magistrate in the manner provided for in Section 70 of Act VIII of 1859. Instead of following that course, the Government chose to come forward and to insist on being made a defendant and on itself contesting the plaintiff's right to erect this *bund*. It was a fatal blunder in Government to interfere as it did. But its advisers apparently considered that (as the Judge of Hooghly says in his judgment) "Government represented the public in the case, whose rights were endangered by the acts of the plaintiff." It appears to us to be clear that the Government, having as a defendant raised and tried certain issues of title or right as between itself and the plaintiff, must remain bound by the decision on those issues which it has brought on itself, whatever becomes of so much of the suit as concerns the Deputy Magistrate. A party who forces himself into a suit as

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defendant, is exactly as much a defendant in all respects as if he had been originally named a defendant by the plaintiff in his plaint. And if issues are raised by such a defendant as between himself and the plaintiff, and if those issues are properly tried as between them and judgment passes upon them, that judgment will stand and will bind the parties, whatever may be the judgment on the original question between the plaintiff and those against whom alone he in his plaint sought relief. We think, therefore, that the application for review should be rejected so far as it seeks to affect the declaration of the plaintiff's right to erect and maintain the *bund* as against the Government.

Considering the very good reason which the plaintiff had to complain of the conduct of the Deputy Magistrate,—considering also the manner in which his defence has been conducted,—we think that the Deputy Magistrate is not entitled to recover any costs from the plaintiff, but that he ought not to be ordered to pay any costs; and we shall alter the decree which has been made accordingly. But as regards the Government, our decree for costs will remain unaltered; and the Government must, moreover, pay the plaintiff his costs of this application for review. It is impossible to apportion the costs in this case so as to charge the Government only with such a share of costs as would represent the plaintiff's claim for a declaration of right as apart from his claim against the original defendants, personally, for damages. His suit was substantially a suit for damages, and was valued as such only. The Government come in, and contesting the plaintiff's right on its own account, in fact altered the whole nature of the suit. The sum at which the plaintiff values his suit, although based solely on the account of damages claimed, is not in excess of the value which might have been put upon the suit had it been one instituted originally merely for the purpose of establishing the plaintiff's right as against Government, and under all the circumstances we are clearly of opinion that it is only fair to the plaintiff that he should receive full costs from the Government.

The manner in which this suit has been conducted on behalf of Government is most extraordinary. The line adopted throughout has been such as to put the Government to the greatest possible expense with the least possible chance of benefit. The suit was instituted against an individual for damages for an act done by him illegally in excess of his jurisdiction as Deputy Magistrate. The Government had nothing to do with the suit, and would neither directly nor indirectly have been affected by its result. If the Government was of opinion that the Deputy Magistrate acted rightly, it would have been perfectly fair and reasonable that the Government should (under Section 70 of the Civil Procedure Code) have undertaken the defence of the suit. Or if it was not thought desirable to proceed under Section 70, the advisers of Government might have been instructed to conduct the defence for the Deputy Magistrate, and the Government might have indemnified him against any damages or costs he might be ordered to pay. Had this latter course been followed, the Government would have done all that could possibly be done for the Deputy Magistrate, while it would have itself remained clear of and unaffected by the suit. The Government advisers, however, for reasons best known to themselves, chose (instead of merely undertaking the defence of the Deputy Magistrate) to insist upon Government being formally placed upon the record as a defendant, —a step from which no good could possibly accrue to Government or to the Deputy Magistrate, and from which much harm could accrue, and has in fact accrued, to Government. Having become a defendant the Government puts in a written statement which is vague and weak in the extreme. The case goes to trial, and is not properly put before either of the Lower Courts, or even before us at the hearing of the special appeal; the best, if not the only real, defence which the Deputy Magistrate had, not being relied on, or, we may say, thought of, till it is brought up before us on an application for a review of our judgment. Finally, this defence is urged before us, and a review is prayed for by the Government, and not by the Deputy Magistrate who alone could properly urge the plea now relied on.

It appears to us to be a serious matter that litigation on behalf of Government should be conducted after such a fashion.

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The 16th June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Hindoo widow—Arrears of maintenance.

Case No. 319 of 1871.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 29th December 1870, *modifying a decision of the Subordinate Judge of that District, dated the 29th November* 1869.

The Court of Wards (Defendant) *Apellant,*

versus

Rajah Mohessur Roy (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Mr. R. T. Allan and *Baboo Debendro Narain Bose* for Respondent.

Arrears of maintenance due to a Hindoo widow at her death, do not necessarily revert to the estate from which they were to be derived, on the ground that they were not separated from the corpus of that estate during her life.

Ainslie, J.—RAJAH BIRESSUR ROY died leaving a widow, Ranee Joy Soonduree, and two sons, Rajah Chunder Shekuressur Roy and Rajah Mohessur Roy. By an arrangement made by the Rajah, the profits of certain villages and a further sum of rupees 2,000 per annum were assigned for the maintenance of the Ranee after his death, and on the 12th Assar 1269 an ikrarnamah was executed by the sons acknowledging her claim.

Rajah Chunder Shekuressur subsequently died leaving a will dated 2nd Srabun 1272, in the 9th paragraph of which he recites the above-mentioned ikrarnamah and admits that rupees 1,000 of the said annual sum of rupees 2,000 is payable out of his estate on account of the arrangements made by his father, and provides for a further payment to his mother of 400 per annum out of his separate estate.

Rajah Chunder Shekuressur died leaving a minor son, the present defendant represented by the Court of Wards, against whom the Ranee brought a suit to recover arrears of her allowance at the rate of rupees 1,400 per annum.

She died while the suit was pending, and after some intermediate proceedings her son Rajah Mohessur Roy was allowed to carry on the suit, fresh issues being added as follows, framed on objections by the defendant :—

1.—Is the present plaintiff entitled to receive the maintenance due to the deceased plaintiff.

2.—Who according to the Shastras is entitled to advance a claim to the allowance.

The Court of first instance held that under the 9th paragraph of the will of Rajah Chunder Shekuressur, the plaintiff was only entitled to a moiety of the arrears due to the Ranee.

On appeal, the Judge held that the allowance of rupees 2,000 per annum granted by Rajah Biressur Roy was of the nature of "streedhun," and that the right to the arrears claimed in respect of that allowance had devolved by inheritance on the plaintiff, the son, to the exclusion of the defendant, the grandson of the late Ranee, but that the right to take the arrears due on account of the subsequent grant of an annuity of rupees 400 by Rajah Chunder Shekuressur is to be regulated by the terms of the will, and that each party will therefore take a half share of these.

This special appeal is now brought on several grounds :—

1*st.*—That the finding of the Judge that the money claimed is streedhun and as such capable of being inherited by the Ranee's son, the plaintiff, is wrong in law, and that the nature of the property has been affected by the agreement of 28th June 1862 which the Judge has not considered.

2*nd.*—That the money claimed was not appropriated during the lifetime of the Ranee, and therefore remains as part of the estate from which it was to be derived.

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3rd.—That the Ranee sued under the will and was therefore bound by its terms, and consequently the present plaintiff is equally bound by them.

4th.—That the suit should not have been revived after the death of the Ranee, as the cause of action did not survive.

On the last point, it is sufficient to observe that the first Court tried the suit on its merits, and that when the plaintiff appealed to the Judge in respect of that part of his claim which had been disallowed, the defendant did not raise this question by way of cross-appeal against the decree in favour of the plaintiff.

The first part of the first objection is met by a passage in the Dayabhaga, Chapter IV, Section I, Verse 15.

" So Devala says :—Her subsistence, her "ornaments, her perquisite, and her gains are " the separate property of a woman." Subsistence in the note is explained as what remains of that which is given for her food and raiment.

But it is said that streedhun is constituted by an unconditional gift, whereas this gift was limited by the conditions of the agreement of 1862. This instrument recites that the Ranee had asked her sons to give her in writing an acknowledgment of the arrangements made by their father in her favor, and that they accordingly confirm the gift for life of the profits of certain villages, and promise to pay the fixed allowance of rupees 2,000 per annum. The agreement then continues—" Excepting the right to the " use and enjoyment of all these things, you " shall have no power over them to alienate " them by gift, sale, or in any other manner, " and after your death all the said properties " will be taken by us and our heirs."

In the schedule at foot of the ikrarnamah the allowance of rupees 2,000 is entered after the specification of the several villages.

It is contended that this ikrarnamah defines the mode in which the property is to devolve after the Ranee's death, but we fail to see that it introduced any change in the nature of the property.

The Ranee's rights were derived from her husband, and not from her sons. She surrendered nothing, and they added nothing to what their father had given. The object of the ikrarnamah was simply to prevent litigation by making a declaration in writing binding on both parties. They admitted her rights as life-tenant of certain villages and to a fixed annual payment in cash, and she admitted that she had no more than a life interest.

The words " after your death they will be taken by us and our heirs" are simply the natural result of the admission by the Ranee that her interest was limited to her life, and cannot be construed as an agreement between the two brothers by which the ordinary course of inheritance was to be modified. As regards the villages, no change results from the passage relied on, and that it was deliberately intended to be a compact between the two brothers introducing a change in the succession to the accumulations of the cash allowance, if any, is not to be inferred from words which may very well have been used without any such intention and when no allusion to any such accumulation is made.

Now it is said that as the money claimed was never separated from the *corpus* of the estate of the deceased Rajah during the lifetime of the Ranee, and as the grant was only intended for her individual use, it must now go with the rest of the estate to the heirs of the Rajah. It is admitted that if the Ranee had borrowed money for her maintenance or had raised money on other property in consequence of this being withheld, she and her representative would have had a title to claim this allowance to make good the loss or liability so incurred; but as nothing of the kind is alleged, it is contended that when the necessity for the payment ceased with her death, the unpaid arrears reverted to the estate from which they were to be derived. But it has been held, VIII Weekly Reporter, page 41, that arrears of an allowance for maintenance can be legally attached in execution of a decree, which could not be done if the maintenance belonged of right to another estate until actually separated; and further, the plea is founded on the defendant's own wrongful act in withholding from the Ranee the allowance she was entitled to. Had she lived a few weeks longer and obtained and executed a decree, no question could have been raised,—and if we were to allow this plea, we should be giving to the defendant a reward for refusing to do that which, as has been found, he was clearly bound to do.

Lastly it is contended that the Ranee, when she sued under the will of Rajah

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Chunder Shekuressur, accepted the bequest with the conditions annexed thereto. In respect of Rajah Chunder Shekuressur's own bequest of an annuity of rupees 400 the plaintiff is content to take on these conditions. Defendant contends that he cannot split up the will into parts, and that if plaintiff takes the bequest of rupees 400 he must do so with all the conditions.

The 9th paragraph of the will is in the following terms:—

"An annual allowance of rupees 2,000 and "certain talooks were allotted by my father "for my mother's maintenance, and that "allotment was confirmed by our agreement. "One-half of that rupees 2,000 is payable "by me: in addition to that my mother is to "receive rupees 400, in all rupees 1,400 per "annum, from my estate. On her death, "her estate, talooks, cash and goods, &c., "we two brothers will take in equal shares, "and my heirs if I am not alive."

The appellant would treat this as if the Ranee had resigned to her son half of the rights she took under his father's grant and received it back as a new bequest by the son, subject to any conditions he might attach thereto. But we do not think that the fact that she claimed under the will can be so construed.

The testator does not speak of any such arrangement: he merely recites what had been done and admits an existing liability. If anything beyond mere recital was intended, it apparently was this,—that the joint liability of the two sons under the arrangement made by the father should be split up into two several liabilities, so that while he acknowledged his duty to pay half the allowance granted by his father, he might free his estate from any responsibility for non-payment by his brother of the whole or any portion of the other half. Looking to the previous agreement, we see how anxious the family was to guard against disputes and litigation among themselves, by reducing their claims and obligations to writing, and we think it was only with this object that the allusion to the father's arrangement was made.

On the death of the Ranee, the property held by her from the father would revert to the father's estate and pass to his heirs then living, but the Ranee had no power to alter the course of succession, nor had Rajah Chunder Shekuressur any power to dispose by will of that which did not during his lifetime fall into his estate.

In this view, and under these circumstances, this appeal will be dismissed with costs.

The 16th June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Review—Jurisdiction — Contribution (per capita or proportionately.)

Case No. 2384 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 16th July 1870, modifying a decision of the Sudder Moonsiff of that District, dated the 19th July 1869.

Shaikh Murdan Ali and others (Defendants) *Appellants,*

versus

Shaikh Tufuzzul Hossein and others (Plaintiffs) and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Baboo Bama Churn Banerjee for Respondents.

A suit having been brought before a Subordinate Judge against co-sharers in a joint property for contribution on account of costs levied from plaintiffs in a suit which had been preferred by all the co-sharers (plaintiffs and defendants) together, a decree was given ordering the defendants to contribute *per capita* in equal shares. On application made to the Subordinate Judge's successor, a review was granted and additional evidence called for as to the respective shares of the parties in the property.

HELD that the Subordinate Judge was legally competent to admit the review and call for the evidence.

HELD that the parties were liable for contribution according to their respective interests in the property, and not simply *per capita.*

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Jackson, J.—In this case, the plaintiffs sued for contribution, the plaintiffs being 7 co-sharers and the defendants being 3 co-sharers in a joint property in respect of which a suit had been preferred by all these parties together, and had been dismissed with costs, which costs have been levied from the plaintiffs.

The decree was given in the first instance by the former Subordinate Judge, in which the defendants were ordered to contribute *per capita* in equal shares. Application was then made to the Subordinate Judge who succeeded him, Baboo Grish Chunder Ghose, to review that judgment and modify the decision by awarding contribution in proportion to the shares which the parties respectively owned in the joint property. The Subordinate Judge admitted the review, and called for some additional evidence, being a *kobalah* which the plaintiffs had in their possession, in order to satisfy himself as to what their respective shares were.

In the first place, it is contended that the admission of the review under those circumstances was improper. But it seems to me that that is a matter which we cannot touch in special appeal. The Subordinate Judge was legally empowered to admit a review if he thought fit, and having admitted it he also had power to call for additional evidence if he thought that the interests of justice required it.

It is then contended that the kobalah which was put in afterwards by the plaintiff was no evidence as to what the shares of the parties respectively were. There might be something in this argument if the defendants had anything to allege as to what the shares were otherwise than what has been found by the Courts below ; but the defendant, no doubt for prudential reasons, declined saying anything whatever on that point. We have, therefore, no reason to suppose that the decision was in fact wrong. I think the special appeal must the dismissed with costs.

Macpherson, J.—I also think that this appeal should be dismissed with costs. I have no doubt that the parties are liable to contribution amongst themselves, according to their respective interests in the subject of the original suit, and not simply *per capita*.

The 16th June 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Suit for rent—Limitation—Deduction —Tender of payment.

Case No. 236 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 3rd September 1870.

Eshan Chunder Roy (Defendant) *Appellant,*

versus

Khajah Assanoollah (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Appellant.

The Advocate General and *Mr. R. E. Twidale* and *Baboo Chunder Madhub Ghose* for Respondent.

Where limitation is pleaded in a suit for arrears of rent, deduction must be allowed to the landlord for the time he was suing to eject defendants as trespassers.

A ryot's tender of payment to be valid, must be made at the proper place and to a person authorized to receive the same.

Jackson, J.—We think that this appeal must be dismissed on all points. It was a suit for arrears of rent for the years 1272 —1276. The lower Court has decreed the whole of that rent with costs and interest.

The first point which has been taken in appeal is that the rent for the year 1272 is barred by the law of limitation.

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We think that the Subordinate Judge has given very good reasons for holding that it is not barred. The principle laid down by the Privy Council in the case of Ranee Surnomoyee* applies very clearly to this case. It was impossible under the circumstances of the litigation pending between the plaintiff and the defendants that the plaintiff should have brought this suit against the defendants as his tenants for rent whilst he was still suing to eject them as trespassers.

The next point upon which this appeal is preferred to us is as regards the costs in the lower Court. The determination of that question rests upon the tender, which it is stated the defendants made just about the time when this suit was instituted. Their allegation is that they tendered the full amount of the money which they considered to be due before the plaint was written out. The evidence upon the point is very doubtful, even upon the fact which the defendants wish to prove. But there is against them also the fact that the tender was not made at the proper place or to a person authorized either under the law or by the plaintiff to receive the money. Such a tender is not sufficient, and the plaintiff is, therefore, entitled to his costs. It is also to be recollected that this tender was made at the very last moment of three years arrears of rent.

A cross-appeal is taken on the part of the plaintiff as regards the interest which has been awarded, and also as to the rate of interest. But we think we ought not to interfere on either point. We think the Subordinate Judge was quite right to give no interest previous to the decree, as previous to that time the question was still open as to whether any rent should be paid or not.

As regards the rate of interest, this rate is not founded upon the rent law, but founded under Act VIII of 1859 on the total amount due at the date of the decree.

There only remains the question of 831 rupees which was claimed as a set-off, and which, we think, as it is admitted, may be deducted from the amount of the decree.

We affirm the decree of the lower Court with this modification that the sum of rupees 881 be deducted from it.

Each party will bear his own costs of this appeal.

* 11 W. R., P. C., p. 5.

The 19th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Agent's fraud—Benefit to principal—Regulation VIII. 1819—Sale valid—Effect void.

Case No. 2264 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 12th August 1870, *affirming a decision of the Sudder Ameen of that District, dated the 24th March* 1868.

Koylash Chunder Banerjee and another (Defendants) *Appellants,*

versus

Kalee Prosunno Chowdhry and another (Plaintiffs) *Respondents.*

Baboos Anund Chunder Ghossal and *Kalee Mohun Doss* for Appellants.

Baboos Doorga Mohun Doss and *Mohinee Mohun Roy* for Respondents.

A putnee talook being about to be brought to sale under Regulation VIII of 1819, the agents of the sharers were in attendance at the Collectorate on the day of sale, prepared to pay the rent due. Two of the agents (G and B) happening to be out of the way at the time the lot was about to be called up, the third (K) without informing the Collector or zemindar's agent of their intention to pay, or giving notice to the others, purchased the putnee.

HELD that K's act was one of bad faith and that the 4 annas share-holders whom he represented could not in equity be allowed to benefit by adopting the fraud.

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HELD that as between the Collector and zemindar and the defaulting putneedars the sale was valid; but that it was void so far as it created a title in favor of the 4 annas share-holders to the 12 annas share, and K must be treated as having made the purchase on account of, and as a trustee for, the 12 annas share-holders.

Norman, C. J.—THE plaintiffs in this case were holders of 12 annas of a putnee talook called Chur Shulyo Ghose, the remaining 4 annas of which belonged to certain persons who have been called in these proceedings the Bhoomick and Poddar defendants, each of whom had 2 annas. On the 14th of May 1866, the putnee was being brought to sale in pursuance of the provisions of Regulation VIII of 1819. The agent for the plaintiffs and the agent for the Bhoomick and Poddar defendants were both ready at the Collectorate on that day, prepared to pay their shares of the rent. The zemindar's mookhtear, Baboo Mohima Chunder Dutt, objected to take the rent without the payment of some small expenses. Both parties at first refused to pay these expenses, but ultimately the plaintiff's agent Chunder Mohun Ghose agreed to pay his share of the expenses. The agent of the 4 annas share-holders, Kalee Banerjee, however, refusing to pay their share of the expenses, the zemindar's mookhtear would not take payment of the rent.

An account of what took place is given by the witness Chunder Mohun Ghose. He says :—"I was not in a position to pay "the whole 16 annas of the rent. Kalee "Banerjee, the agent of the 4 annas share-"holders, took me away from where the "Collector was sitting in order that we "might prepare a petition for the purpose of "lodging the rent in the Collectorate."

There was a "talk" or "agreement" (the meaning of the Bengalee word used is not very clear) that Koylash Chunder Banerjee who was the agent of one of the 4 annas share-holders should remain in Court to watch the proceedings, and should give notice when the sale commenced. Chunder Mohun Ghose and Kalee Banerjee went down-stairs and commenced writing a petition for the purpose of lodging the rents.

Chunder Mohun Ghose then goes on to say :—"After the petition was half finished, "Kalee Banerjee said to me 'Let us go "'and see what is doing upstairs.' I went "up and saw that Koylash had purchased the "putnee."

Mohima Chunder Dutt, the agent of the zemindar, deposed that it appeared to him that Chunder Mohun Ghose had been got out of the way fraudulently, for the purpose of enabling Koylash Chunder Banerjee to make the purchase.

We think that there is no doubt that it was an act of bad faith amounting to fraud on the part of Koylash Chunder Banerjee to remain and purchase the putnee without making any attempt to inform the Collector or the zemindar's agent as to what was taking place in the room below, or attempting to convey any information to Chunder Mohun Ghose or Kalee Banerjee that the lot was about to be called up. Had Koylash Banerjee spoken to the Collector, the sale might have been stayed at least for a time long enough to enable Chunder Mohun Ghose and Kalee Banerjee to come upstairs. Had he told Chunder Mohun Ghose that the sale was about to commence, the rent would no doubt have been paid, and the sale would never have taken place.

We think we should be deciding this case contrary to equity and good conscience if we were to allow the 4 annas share-holders to enrich themselves at the expense of their co-sharers by adopting the fraud of their agent.

We think that the decree of the Lower Appellate Court so far as it declares the sale to be void cannot stand, because as between the Collector, the zemindar, and the defaulting putneedars, the sale was perfectly valid and binding. The question we have to deal with is not whether the sale should be set aside, but what is the effect of the purchase at that sale.

We think that Koylash Chunder Banerjee must be treated as having made the purchase on account of, and a trustee for, the plaintiffs, the 12 annas share-holders, to the extent of their 12 annas share; that the sale, therefore, so far as it creates a title in favour of the present appellants or the Bhoomick and Poddar defendants to the 12 annas share of the plaintiffs must be declared void. It must be declared that the plaintiffs are entitled as from the date of that purchase to their 12 annas share, the plaintiffs being accountable to the defendants for the amount of the rents from which they have been released by the defendants' payment of the purchase money. To this extent the decree of the Lower Appellate Court must be modified, and the respondents will have their costs of this appeal.

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The 19th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Revenue Courts—Jurisdiction—Incidental question of title.

Case No. 70 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 31st August 1870, *reversing a decision of the Deputy Collector of that District, dated the 30th May* 1870.

Mohesh Dutt (Defendant) *Appellant,*

versus

Baboo Beg Narain Singh (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Nil Madhub Sein and *Umbika Churn Bose* for Respondent.

In a suit for arrears of rent under Act X of 1859, where defendant admitting plaintiff's interest in the land alleged that it was the ijmalee property of himself and the plaintiff, the Revenue Court dismissed the suit on the ground that it had no jurisdiction. The Judge in appeal reversed the decision and gave plaintiff a decree.

HELD that even if the Judge had gone simply into the question of title and decided whether the estate was joint or separate, and on that decision based a decree, he would not have been wrong.

Glover, J.—THIS was a suit for arrears of rent of the year 1274. The defendant admitted that the plaintiff had an interest in the land for which rent was demanded, but said that it was the ijmalee property of himself and the plaintiff, and that although he cultivated a certain portion of land within the estate, he was for that land not in the position of the plaintiff's tenant.

The first Court considered that this was a question of disputed shares of an estate which could not possibly be decided in a Revenue Court, and held that he had no jurisdiction.

The Judge reversed this decision, and found that the plaintiff had proved by his evidence that the land belonged to him separately; that the defendant had entirely failed to prove that the family was an undivided family and the property joint; and that as the defendant admittedly cultivated land within his property, the plaintiff was entitled to recover rent from him.

The point taken in special appeal is that in an Act X suit the relationship of landlord and tenant is not to be proved by going into the question of title; that in this case no kubooleut has been produced nor any proof of payment of rent by the defendant in previous years; and that the Judge was wrong in deciding the question of tenancy upon the evidence of a joint title put forward by the plaintiff.

We think that substantially the decision of the Judge was right and should be affirmed. The question as to whether the Revenue Courts would be entitled to go into matters connected with title with the view to prove the relationship of landlord and tenant between a plaintiff and defendant was a good deal discussed in the case of Hurree Pershad Malee *versus* Koonjo Beharee Shah and others, reported at page 29 of the Special Number of the Weekly Reporter, (Full Bench cases); and it was there laid down that where a plaintiff came into Court suing as landlord for rent and was met by the defendant claiming a separate right of his own and a denial of the tenancy, it was for the Court first to consider the circumstances of the case and the evidence and to decide whether it had jurisdiction or not; and to do this, of course, it was necessary to go incidentally into the question of title, because until that had been shown to be one way or the other, the Revenue Court could not have known whether it had jurisdiction or not. The same principle was laid down at page 47 of the same volume, in the case of Doyal Chunder Ghose and others *versus* Dwarkanath Misser and others, that where a plaintiff comes into Court demanding rent, the question of jurisdiction is not ordinarily raised by what he may say in his petition, but by the defence which is set up by the defendant, and if the defendant denies that

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the Court has any jurisdiction and grounds that denial on the fact that he is a shareholder in the estate and a co-proprietor with the plaintiff, it is manifest that before the Court can hear the case it must go into that question and decide it in so far as the purpose of the case is concerned.

We have been referred to a Full Bench Ruling reported in Volume VIII, Weekly Reporter, page 428, in the case of Prosunno Coomar Paul Chowdhry *versus* Koylash Chunder Paul Chowdhry; but this we may remark was a very peculiar case, and indeed it has nothing in common with the one now before us, and the opinion of the learned Judges in that case had reference solely to the peculiar nature of the reference then made to them, and they by no means lay down any general rule such as has been laid down in the cases just mentioned.

We think that even if it could be said that the Judge in deciding this case had gone simply into the question of title and had decided that the estate was joint or separate, and on that decision had based a decree with reference to the rent, he would not have been wrong; but it so happens that there was also other evidence on which the Judge seems to have relied as much, if not more than upon the evidence of title. Several witnesses were examined, and three of them at least have deposed to the fact that the plaintiff received rent from the defendant for the land in dispute up to the time the case was instituted. There is no question with regard to the veracity of these witnesses raised in the grounds of appeal, and the Judge, after contrasting their evidence with the evidence given by the defendant's witnesses, has given a clear opinion that it is worthy of credit; and this evidence, without going any further, would be sufficient to establish the relationship of landlord and tenant between the parties to this suit. It is contended, no doubt, that the Judge has not expressly said in his judgment that he relies upon this evidence, but although there is no express mention of that fact, he does say that he has made a selection between the evidence of the plaintiff and that of the defendant, and that there is no doubt as to which is most reliable, and as he alludes here to the whole of the oral evidence it necessarily includes that of the three witnesses above mentioned.

This is the only ground taken in special appeal, and as it fails the appeal must be dismissed with costs.

The 19th June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Criminal proceeding—Right of suit—Abuse—Damages.

Case No. 215 of 1871.

Special Appeal from a decision passed by the Judge of 24-*Pergunnahs, dated the* 28*th December* 1870, *reversing a decision of the second Additional Moonsiff of Alipore, dated the* 27*th May* 1870.

Sreenath Mookerjee (Plaintiff) *Appellant,*

versus

Komul Kurmokar and others (Defendants) *Respondents.*

Baboos Oopendro Chunder Bose and *Jogendro Chunder Bose* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The failure of an injured party to institute criminal proceedings does not deprive him of his right to bring a suit in the Civil Court to recover damages for abuse.

Mitter, J.—We think that the Judge is wrong in holding that the abusive words complained of by the plaintiff in this case are not actionable. It is true that the plaintiff might have instituted proceedings against the defendant in the Criminal Court; but his failure to do so does not deprive him of his right to bring a suit in the Civil Court. The case is governed by the ruling of a Division Bench of this Court in case of Kalee

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Coomar Mitter *versus* Ramguttee Bhuttacharjee.* The words alleged to have been used were certainly such as to wound the feelings of the plaintiff. The Lower Appellate Court must, therefore, come to a clear finding upon the evidence whether the defendants did use those words or not. We wish further to observe that if the plaintiff's case is a true one, it would be certainly wrong to saddle him with all the costs of this litigation.

The case is therefore remanded to the Judge to be tried with reference to the above remarks. Costs to abide the result.

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* The 16th December 1870.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Case No. 1580 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 26th May 1870, *reversing a decision of the Moonsiff of Busseerhaut, dated the 18th December* 1869.

Kalee Coomar Mitter (Plaintiff) *Appellant,*

versus

Ramguttee Bhuttacharjee and another (Defendants) *Respondents.*

Baboo Kashee Kant Sein for Appellant.

Baboo Sreenath Doss for Respondent.

Loch, J.—We think that the Judge is wrong in refusing to exercise jurisdiction in this case.

We think that a suit for recovering damages for abuse will lie in the Civil Court, and we find there are various decisions of this Court to support this view. We refer to one reported at page 19, Volume I, Weekly Reporter, and another in Volume VI, *idem*, page 151.

It was urged by the respondent that the present is a suit of a nature cognizable by a Court of Small Causes, and that therefore no appeal will lie; but referring to Section 6 Act XI of 1865, we see that this is not a suit of that nature, for Clause 3 of that Section provides as follows:—'No action shall lie in any such Court" (namely a Court of Small Causes) "for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury."

Now here it is not alleged that any pecuniary damage has resulted, and we therefore reject the objection taken in bar of this appeal.

The case will go back to the Judge in order that he may dispose of it on the merits.

Costs will follow the ultimate result.

Paul, J.—I concur.

The 21st June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice.*

Court Fees — Defendant without means—Section 280 Act VIII of 1859—Section 8 Act XXIII of 1861.

Case submitted to the Chief Justice by Mr. R. Belchambers, Taxing Officer of the High Court, under Section 5 *of the Court Fees' Act,* 1870.

J. M. Edmond and another,

versus

M. Niersis.

When a plaintiff, in order to make proof under Section 281 Act VIII of 1859, that the defendant, for the purpose of procuring his discharge without satisfying the decree, has wilfully concealed property, &c., chooses to examine the defendant, he must pay the Court fees for the oath and the cost of reducing the deposition of the witness to writing. It is otherwise under Section 8 Act XXIII of 1861, in which case the fee is apparently demandable, if at all, from the applicant.

Case.—The defendant, having been arrested in execution of the decree obtained against him in this suit, applied for his discharge under Sections 280 and 281 of Act VIII of 1859. On being brought before the Court he was examined by the plaintiff, and his examination was reduced into writing in conformity with the usual practice in such cases.

It is submitted on behalf of the plaintiff that the fee allowed by the table of fees, as per margin* for swearing a witness and reducing his deposition into writing, is not payable when a defendant is examined under Section 281, or, if payable, is not payable by the plaintiff.

* Every oath or affirmation administered to witnesses in Court, or before a Judge or duly authorized officer of the Court... Rs. 12.
For reducing into writing the depositions of witnesses, per each folio of 90 words Ans. 8.

In support of the first alternative it is stated that a defendant when examined under Section 281 is not a witness in the sense contemplated by the table of fees.

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Section 281 provides that the plaintiff "may make proof that the defendant for the purpose of procuring his discharge without satisfying the decree has wilfully concealed property or his right or interest therein or fraudulently transferred or removed property or committed any other act of bad faith;" and with a view to make such *proof* the plaintiff usually examines the defendant, and sometimes other persons also.

In support of the second alternative it is stated that a defendant who is examined under Section 281 attends on his own behalf and tenders himself for cross-examination, and that if any fee is payable for reducing his examination into writing, it should be borne by himself, and not by the plaintiff.

It would be impossible to obtain payment of the fee from a defendant discharged on the ground that he has no property, though if it be held that the fee is payable by the defendant it could be paid by the Accountant-General of the Court out of a fund in his hands the interest of which is applicable for the purpose of obtaining the discharge of prisoners.

It may be hard to require payment of the fee from a plaintiff who by the discharge of the defendant has been deprived of the benefit of his decree; but the same might be said of any other fee paid by him in the suit.

When persons other than the defendants are examined by the plaintiff under Section 281, it is not denied that the plaintiff would be liable for payment of the fee for reducing into writing the examination of such persons.

The question which I am asked to refer for the determination of the Hon'ble the Chief Justice, is whether any fee is payable for reducing into writing the examination of a defendant examined under Section 281; and if so, by whom the same is payable.

Opinion of the Chief Justice.

I think that when the plaintiff in order to make the proof preferred to in Section 281 chooses to examine the defendant, he must pay for the oath and the cost of reducing the deposition of the witness to writing.

It would be otherwise under Section 8 of Act XXIII of 1861, in which case the fee is apparently demandable, if at all, from the applicant.

The 21st June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Plea in bar—Jurisdiction—Collateral issues—Section 2 Act VIII. 1859—Execution proceedings—Section 11 Act XXIII of 1861.

Case No. 226 of 1870.

Regular Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 23rd August 1870.

Salahmunissa Khatoon (Plaintiff) *Appellant,*

versus

Mohesh Chunder Roy and others (Defendants) *Respondents.*

Baboos Sreenath Dass, Hem Chunder Banerjee and *Grish Chunder Ghose* for Appellant.

Baboos Kalee Mohun Dass, Doorga Mohun Dass, Romesh Chunder Mitter and *Nullit Chunder Sein* for Respondents.

Where a plea of *res judicata* is set aside and a suit admitted by a Judge, his successor has no authority to re-open the question, but should, under any circumstances, record his opinion on the merits.

A decision on a collateral issue as to the rights of the parties prior to a decree in a suit for enhancement of rent, is no bar to another suit on the point so decided.

Jackson, J.—The plaintiff has brought this suit with reference to certain proceedings in a former suit, which the present defendant brought against him so far back as the year 1848. The present defendant in that suit sought to enhance the rent of the present plaintiff's under-tenure, situated in 6 different mouzahs, *viz.*, mouzah Aynapore Teghurree, Kismut Chandoir, Kismut Augbdhakooly, Kismut Pach Dhakooly, Kismut Sola Kahanya, and Kismut Kankaly.

One of the points which was contended for in that suit on the part of the then defendant was that although the defendant held some portion of some of these mouzahs as an under-tenant, still he held a very much larger portion of them in his own proprietary right. The question as to the rights of the parties was then put in issue and a decision was then arrived at, and the plaintiff was declared entitled as proprietor to the whole of these mouzahs, and obtained a decree for enhancement of the defendant's rent.

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The decree of 1848 seems to have been executed with some delay. But in 1863 we find execution proceedings going on up to the High Court, in which it was held that in execution of that decree the Ameen might measure and ascertain what amount of land was situated in those mouzahs, and even if he found land in excess of what was stated in the plaintiff's plaint to be the extent of those 6 mouzahs, still the plaintiff would be entitled to assess the whole of the land so found as covered by the decree.

Again in 1867 and 1868 execution proceedings were carried on, and an Ameen then went to the land and measured the whole of these mouzahs and reported that there were 176 khadas, upon which he assessed rent.

It is said that the then defendant was not present at the time of the measurement by the Ameen. He appears to have raised no objection before the Ameen; but he put in a petition of objection before the Court which was executing the decree, stating that the Ameen had not only measured the lands of the mouzahs contained in the decree, but that he had measured also lands belonging to defendant's mouzahs separate from those relating to the decree.

This question was tried by the Court executing the decree and was decided against the then defendant. The defendant appealed to the Judge and subsequently appealed to the High Court, and the decision of the first Court was confirmed rejecting all his objections.

The then defendant has now come forward as plaintiff in this suit, praying for confirmation of his rights as talookdar in 120 khadas of land situated in different mouzahs, which, he says, are his own property, situated in different mouzahs, pergunnahs and tuppahs, distinct from those for which the suit for enhancement was brought. The plaintiff states that these lands were taken possession of by the plaintiff in execution of the decree under the Ameen's proceedings; and he therefore sues for confirmation of his rights in these lands.

The defendant, on the other hand, alleges that these lands belong to the mouzahs for which the former suit was brought and for which he obtained a decree, and that they are his properties.

The case was first taken up by the Subordinate Judge of Dacca, Mr. Wright, and on that occasion he tried only the issue of *res judicata* which the defendant had urged in bar.

Mr. Wright was of opinion that the suit was not barred by the former decision. He, therefore, fixed a day for hearing evidence on the merits. He appears subsequently to have left the district, and another Subordinate Judge, Baboo Kally Prosad Dutt, having taken his place, after hearing all the evidence on the merits, instead of passing any decision upon them, again referred to the question as to whether the suit was estopped by the former decision, and coming to a different decision from Mr. Wright dismissed the plaintiff's claim, holding that no further suit can be brought upon the subject. I think that Baboo Kally Prosad Dutt had no authority to re-open this question, but that if he differed in opinion from Mr. Wright he might have recorded his opinion, and that he should under any circumstances have recorded his opinion on the merits also. The whole question, however, is now before us

The first point for decision is whether this suit is barred by the former decision. There are two decisions, one prior to the decree for enhancement of rent in which certain rights of the parties were determined, and the other in execution of the decree in which it is admitted that the claim of the plaintiff now set up was put forward and determined.

For the defendant it is contended that Section 2 Act VIII of 1859 is a bar to any re-opening of the question decided in the first decision, and Section 11 of Act XXIII of 1861 is a bar to any re-hearing of the issues decided in execution. For the plaintiff, it is said that the issue as to the rights of the parties was only collateral upon the claim which was then preferred for enhancement of rent, and any decision on a collateral issue is not a bar to another suit, directly on the point so decided. And as to the decision in execution, it is said that they were beyond the decree, and cannot, therefore, be held to be a determination of questions arising in execution of the decree.

With reference to the decision prior to decree, the defendant is correct in stating that the question of the rights of the parties was put in issue to some extent collaterally, in order to ascertain whether the parties as respects the mouzahs claimed stood in the

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position of landlord and tenant, and whether the rent of the tenant could be enhanced.

There was no direct decree on the determination of that issue: it was incidentally enquired into in order to settle whether the suit should proceed on other points. In addition to this, there is the fact, that, in that suit no boundaries whatever were given. It was a general claim for enhancement of rent of certain mouzahs. It was left to be ascertained, in execution of the decree, what was the exact position and amount of land contained in the disputed mouzahs, and the amount of rent which was to be assessed upon it. In execution, it does appear at first sight as if the plaintiff had exceeded the amount of land which he had originally claimed, because the Ameen measured 186 beegahs, whereas plaintiff only claimed 114 beegahs. But it is said that under Section 11, Act XXIII of 1861, the decisions which were passed in execution of decree between the parties were final, and that appeals from those decisions having been preferred and decided, no further contest on the points then mooted can now be raised.

We think that it is very doubtful whether the decisions prior to decree or in execution of decree in the former case were final. The contentions of the defendant appear to be good on each point. Although the decision prior to decree was that of a competent Court, still it was not the direct claim raised by the plaintiff to establish his title in the lands; and if that had been his claim, it is not certain that the same Appellate Court would have had jurisdiction to try it even if the same original Court was competent to do so. It was, in fact, a collateral issue. At the same time, the decision then passed is an important piece of evidence in this case. That decision, however, affects only a part of the present claim.

It is difficult also to say that the decision in execution which does affect the whole of this suit is a bar. It was not a decision directly in execution of the decree. That decree did not point out the lands which were to be assessed. It was alleged that the plaintiff had claimed the lands of certain mouzahs before decree, and had added to them the lands of other of the defendant's mouzahs after decree. But the defendant should, in that case, have treated the determination of those questions as being outside the decree. He should not have appealed from that decision in execution, but have brought a fresh suit to contest the point which had been decided against him in execution proceedings. Some difficulty arises because he treated that decision as being one coming within the provisions of Section 11 Act XXIII of 1861. We think, however, that it is not clear, that the plaintiff's present suit is barred by either of the former decisions, and we have therefore gone into the whole of the evidence in the case on the merits. The result is that we are satisfied that the plaintiff cannot succeed even on the merits.

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* * * * * *

We confirm the decision of the Subordinate Judge, dismissing the plaintiff's claim as respects all the lands pointed out by him to the Ameen, except the lands situated in Meghsamil. We set aside the decision of the Subordinate Judge as respects those latter lands, but we pass no decree regarding them.

The plaintiff will pay all the costs of this suit in the lower Court and on appeal.

Mookerjee, J.—I am also of opinion that the plaintiff is entitled to no relief in this action.

The plaintiff sues for a declaration of her right in 120 khadahs 4 pakees 1 gundah of land situated in 6 villages, enumerated in the Schedule attached to the plaint, namely, Aynapore Teghoria, Mouzah Kankaly, Kismut Chandoir, Mouzah Dhakooly Maleebaree, Megsimoel, and Kismut Moosakhoir.

Plaintiff alleges that defendants brought a suit against her in the Civil Court sometime about 1847, for enhancement of rent after service of notice under the provisions of Sections 9 and 10 of Regulation V of 1812 and obtained a decree declaring their right to enhance the rent of the 6 villages, or kismuts which formed the subject-matter of that suit, *viz.*, Aynapore Teghoria, Kankaly, Chandoir Agdhakooly, Panch Dhakooly, and Sola Kahouia, all situate in Pergunnah Rajnuggur, Chukla Ameerabad Basoodebroy, Tuppeh Arungabad; that in execution of this decree which was dated 30th December 1848, the defendants have taken possession of lands belonging to their mouzahs stated above; and that they objected to the proceedings of the Ameen, who wrongfully included these lands, but that the Subordinate Judge rejected their objections on the 16th September 1867. This order was confirmed in appeal by the Judge

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of Dacca on the 17th April 1868, and finally the special appeal preferred by her to the High Court was disallowed by a Division Bench of this Court on the 24th August 1868. Hence the present suit.

On behalf of the defendants the plea of *res judicata* is taken, and it is also contended that the provisions of Section 11 Act XXIII of 1861, bar the entertainment of this suit. On the merits, the defendants state that the lands are the lands of the 6 villages which the decree of 1848 declares to be the sole and exclusive property of the defendants, in which the plaintiff has no sort of interest whatever save that of an izardar under them. In short, it is alleged by the defendants that the plaintiff has raised the very same contention in this suit which had been finally decided against her in 1848 and 1867, by altering the names of some of the villages mentioned therein.

The Subordinate Judge who first tried the issues in bar held the claim not affected or barred. His successor, Baboo Kalee Pershad Dutt, who had to try the remaining issues on the merits of the case, however, took up the issues in bar and held that the suit is barred both under Section 2 Act VIII of 1859 and by Section 11 of Act XXIII of 1861. Although I think it would have been better if the present Subordinate Judge had left the decision of his predecessor on the issues in bar untouched, and had proceeded to adjudicate the other issues in the case, yet having passed his judgment on the issues on which an opinion had been passed by his predecessor, we do not think it necessary to remand the case, but proceed to try whether the Subordinate Judge is right in holding the case of the plaintiff, barred or affected by the laws quoted by him. I am not, however, prepared to say that the Subordinate Judge is wrong in holding that at least a large portion of the claim is barred ; but looking to the decree of 1848, which does not give either the boundaries of the 6 villages, or declare the extent of land comprised in them, and looking also to the nature of the present claim in which the plaintiff offers to prove that his lands of other mouzahs than those claimed in those proceedings have been measured as the lands of the 6 mouzahs, adjudged to the defendants by the decree of 1848, I think it would be most satisfactory if we were to go to the merits of the whole case and see whether the allegations of the plaintiff are really supported by evidence. The decision come to in the execution department in 1867 and 1868, even if they are not conclusive evidence, are undoubtedly evidence against the present plaintiff of such a high character that it would require very clear and convincing evidence now to induce us to come to a different conclusion from them.

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I hold, therefore, that both on the point of *res judicata* and the merits the suit of the plaintiff must fail.

The appeal will be dismissed with costs.

The 21st June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Mahomedan Law—Gifts—Possession — Written contract — Parole evidence.

Case No. 184 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 6th June 1870.

Obedur Reza (Defendant) *Appellant,*

versus

Mahomed Muneer and another (Plaintiffs) *Respondents.*

Messrs. G. Gregory and *C. Gregory* and *Baboo Rajendro Nath Bose* for Appellant.

Mr. Mun Mohun Ghose and *Baboos Ashootosh Dhur* and *Grish Chunder Ghose* for Respondents.

Under the law of the Sherra, gifts are not valid until possession is given by the donor and taken by the donee.

Mookerjee, J.—THE plaintiff Mahomed Muneer and his wife Jobeda Khatoon had instituted this suit to set aside a hibbanamah executed by them on the 10th Bhadro 1274 in favor of the defendant; for confirmation of their title and possession of the

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lands specified in Schedule I attached to the plaint; and for recovery of possession of certain other lands comprised in Schedule II, from which they allege they have been unjustly dispossessed by the defendant.

Plaintiffs state that having no issue of their body, they acceded to the request of the defendant to obtain these properties from them after their death. That the arrangement entered into was that the defendant would at his own expence send us, the plaintiffs, to Mecca; cause a musjid to be erected at our house; pay us a sum of 25 rupees per mensem, and, albeit the hibba, allow the properties to remain in our possession during the period of our natural lives; that the defendant would be entitled to all our properties after our death, and that it was expressly covenanted that on an infraction of any one of these conditions and on failure to carry out any one of these stipulations, the plaintiffs would be at liberty to hold the document of hibba null and void and demand a return of the same.

Plaintiffs further allege that the defendant prepared a hibbanamah stating therein, among other particulars, that the defendant would be entitled to the property from the date of the deed, and inserting therein only one of the conditions agreed upon, namely, the payment of the 25 rupees aforesaid. That the plaintiffs, thereupon, refused to execute the deed, but that the defendant having promised to execute an ikrar soon after, in which he agreed to mention all the conditions settled among the parties, and having represented to the plaintiffs that a hibba would not be valid in Mahomedan Law without a recital that the properties conveyed by it are made over to the possession of the donee, the plaintiffs relying on the faith of these promises executed the hibba but did not part either with their possession of the land or the title deeds thereof.

Plaintiffs finally state that the defendant, after having secured this document from them, did not act up to the conditions thereof, but had dispossessed them of a portion of these lands and mortgaged the whole of the properties to one Soodha Ram Doss alleging the properties to be his own.

The defendant Obedur Reza, in his written statement, denies the possession of the plaintiffs and traverses all the allegations contained in the plaint. He states that the plaintiffs were infirm and old; that they could not well manage their estate and overcome their enemies; they asked him to assist them, and as he did not agree to take all this trouble for nothing, the plaintiffs voluntarily executed the hibba and made over the possession of the properties to him.

Defendant further alleges that "as I did "good to them (plaintiffs) in various ways, "assisted them and removed their necessi-"ties by paying 4,000 rupees, they were "benefitted by and obliged to me, and as I "am their friend and relative they conveyed "to me by hibba the disputed properties "agreeing to take rupees 25 a month as "maintenance."

The Subordinate Judge of Sylhet having decreed the claim of the plaintiffs, the defendant has preferred this appeal.

Having fully and attentively heard Mr. Gregory, the counsel for the appellant, we do not think it necessary to call on the respondent. Mr. Gregory's chief contention is that the Subordinate Judge is wrong in holding that the hibbanamah is invalid under the Mahomedan Law as no possession was given to or obtained by the donee; he contends that the deed clearly states that possession was given, and that the evidence of his witnesses proves the fact of his clients' possession. We have heard the whole of the evidence to possession both of the plaintiffs and of the defendants and the comments of the learned Counsel on them. We, however, unhesitatingly come to the conclusion that the defendant has wholly failed to make out the point of possession, and we entirely agree with the Subordinate Judge that the plaintiffs were and are even now in possession of the whole of the lands with the exception of the 2 mouzahs admitted to be in the possession of the defendant Obedur Reza for 1276, B. S.

The plaintiffs produce all the title deeds of the properties, all the collection papers down to 1276, kubooleuts, and sadhunsari towjee, and has examined a large number of witnesses who are ryots of the disputed lands. They have examined their gomashtas and rent collectors, who not only prove their possession but attest the collection papers filed by the plaintiffs as true and genuine. The defendant, on the other hand, has not been able to prove any of the papers filed by him, nor produce any old ryot or occupier of the soil. No gomashta is examined, and there is literally no evidence

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that during the long period he has been in possession he alleges he received any rent from the disputed land, save and except the rent of two parcels of land which are admitted by the plaintiff to have been wrongfully taken possession by him, and which, the Subordinate Judge says, is about a hundredth part of the properties conveyed by the hibba. Under these circumstances, it appears to us that the hibba is an invalid document under the Mahomedan Law. Under the Law of the *Sherra*, gifts are not valid until possession is given by the donor and taken by the donee. In this case, there is no proof whatever that possession was given by the donors or taken by the donee, and hence the gift is not a valid gift.

It is then argued by Mr. Gregory that the gift is a hibba for a consideration, or *ewuz*, and is therefore not revocable by the donor. It is attempted to be shewn that a sum of 4,000 rupees had been previously paid by the donee to the donors and the hibba was made in consideration thereof. The evidence adduced by the defendant on this point is meagre, unreliable, and unsatisfactory in the extreme. The learned Counsel admits that he is unable to ask the Court to believe that evidence *in toto* and that more satisfactory evidence should have been produced; but he contends that from the evidence of some of his witnesses (who do not at all support his case in any of its details) it is evident that *some* money was paid by his client to the donors. It is true that some of his witnesses state that the plaintiff Moneer told them that he would gladly pay what he has received from Obedur Reza if he, Obedur, would return the hibba to him. None of them, however, can state the amount of the money plaintiff had offered to return, nor say whether it was money paid before or after the execution of the hibba. The testimony is of the vaguest kind possible to conceive: it was therefore most properly rejected by the Subordinate Judge, and we see no reason whatever to differ from him in the conclusion he has arrived about the reliability of that evidence.

Now, as to the conditions on which the hibba was granted,—we perfectly agree with the Judge of the Court below that the evidence adduced by the plaintiffs is true, consistent, and reliable.

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The appeal will be dismissed with costs and interest at 12 per cent.

The 22nd June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Designs—Trade marks—Copyright—Statute Law of United Kingdom—Courts in British India—Jurisdiction.

Reference to the High Court by the Recorder of Rangoon, dated the 17th May 1871.

Baker Tuckers and Co., *Plaintiffs*,

versus

Sutherland Mc Guffie and Co., *Defendants*.

The Advocate General instructed by Messrs. Collis and Co. for Plaintiffs.

Mr. W. A. Montriou instructed by Messrs. Rogers and Remfry for Defendants.

Copyright in designs, being a right created by the Statute Law of the United Kingdom and not thereby expressly extended to India, is a right that cannot be recognized and enforced by the Courts of Law in British India; and a registered proprietor of a design within the United Kingdom cannot sustain an action against a person who has applied such design, or who has sold any article to which such design had been applied, in British Burmah.

Property in a registered design is a right totally distinct in its nature from that of property in a trade mark.

Case.—THIS suit is brought in the Court of the Recorder of Rangoon for an injunction to restrain defendants from manufacturing, purchasing, importing or selling in the markets of Rangoon, handkerchiefs woven of silk or cotton and bearing an ornamented design invented by plaintiffs and registered by them in England according to the Law of the United Kingdom, and for an account, and for rupees 5,000 damages for the injury done to plaintiffs by defendants' unlawful acts.

Plaintiffs claim to be owners of the copyright of the said ornamental design which has been duly registered for the years 1870, 1871 and 1872, under the Acts 5 and 6 Victoria, Chapter 100, amended by 6 and 7 Victoria, Chapter 65, 13 and 14 Victoria, Chapter 104, 21 and 22 Victoria, Chapter 70, and 24 and 25 Victoria, Chapter 73; and certificate of registration is filed with the record.

Plaintiffs allege in the plaint that since the registration of the ornamented design, defendants have wrongfully and injuriously

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imitated the said design and applied the imitation thereof to fabrics of an imferior description to those sold by plaintiffs, bearing the said design, and have sold such inferior goods at a lower price than the goods of the plaintiffs could be profitably sold for ; that defendants had knowledge or must have known that the said design was the property of plaintiffs, and were requested by plaintiffs' attorney, Mr. J. Black of the firm of Gladstone Wyllie and Co., to abstain from infringing plaintiffs' rights, and that defendants have refused to abstain from the infringement thereof.

The defendants, in their written statement, besides averring that they have not infringed any rights of the plaintiffs, take a preliminary objection to the suit by pleading that the Acts of Parliament above mentioned have reference only to the United Kingdom and do not extend to the British Territories in India.

This plea raises the question of law which is now submitted for the decision of the High Court, *viz.*, whether copyright created by the Statute Law of the United Kingdom as above mentioned is a right that can be recognized and enforced by the Courts of Law in British India.

Against the plea, it was urged by Mr. Elmes, the Counsel for the plaintiffs, that the case of Sarazin *versus* Hamil (32 L. J., Ch., 380) though not precisely in point, shows that the Acts of Parliament have operation beyond the limits of Great Britain and Ireland ; that Statute 5 and 6 Victoria, Chapter 100, Section 5, makes the registered owner proprietor of the copyright, and if he be, in fact, the proprietor of a right, then, wherever there are British Courts of Justice, his right will be maintained ; that, though forms of procedure in England, Scotland and Ireland, are given by one of the Acts, it does not necessarily follow therefrom that rights under the Acts will not be recognized elsewhere than in England, Scotland or Ireland ; that the summary remedies prescribed by the Acts do not interfere with the jurisdiction of the superior Courts of law and equity (Sheriff *versus* Coates, I Russ. and M., 159) ; that Section 14 of the 5 and 6 Victoria, Chapter 100, and Section 7 of 6 and 7 Victoria, Chapter 65, are inferential of an intention to protect proprietors of designs out of England ; that Courts of equity act *in personam*, and that this Court is a Court capable of enforcing equitable rights.

In support of the plea, it was urged by Mr. De-Wet, the Counsel for the defendants, that no Acts passed in England since the year 1726 apply to India, unless the British territories in India are specially mentioned in them ; that the Indian Government found it necessary to pass an Act to protect copyright in books in India (Act XX of 1847) at a time when an Act of the United Kingdom was in full force as to books ; that the preamble to Act XX of 1847 shows that the rights under the English Act as to books were of doubtful force in India. So also as to patents, an Act of the Indian Legislature was necessary (Act VI of 1856) to protect patents in India. If it was necessary to enact special Acts to protect copyright in books and patents, it was equally so with regard to copyright of designs.

My own opinion is that the plaintiffs cannot in this Court, or in any Court in British India, have the relief prayed for in the plaint ; but at the request of both parties, the question whether copyright in designs, being a right created by the Statute Law of the United Kingdom and not thereby expressly extended to India, is a right that can be recognized and enforced by the Courts of law in British India, is, in pursuance of Section 22 of Act XXI of 1863, submitted for the decision of the High Court of Judicature at Fort William in Bengal ; and no further proceeding will be taken by this Court until the judgment of the High Court shall have been pronounced.

The judgment of the High Court was delivered as follows by

Norman, C. J.—This was a suit in the Court of the Recorder of Rangoon, for an injunction to restrain the defendants from manufacturing, purchasing, importing, or selling in the markets of Rangoon, handkerchiefs woven of silk or cotton and bearing an ornamental design, invented by the plaintiffs and registered by them in England, according to the law of the United Kingdom under the Acts in force there for the registration of designs.

The plaint alleges that since the registration of the ornamental design, the defendants have wrongfully and injuriously imitated the said design, and applied the imitation thereof to fabrics of an inferior description to those sold by the plaintiffs bearing the said design, and have sold such inferior goods at a lower price than the goods of the plaintiffs could be profitably sold for ; and that the defendants had knowledge or

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must have known that the said design was the property of the plaintiffs. The defendants contended that they had not infringed any rights of the plaintiffs.

The question submitted by the Recorder is:—"Whether copyright in designs being a right created by the Statute Law of the United Kingdom and not thereby expressly extended to India, is a right that can be recognised and enforced by the Courts of law in British India?"

The Recorder says that in his opinion the plaintiffs are not entitled to any relief.

The question turns upon the construction of the two Statutes, 5 and 6 Victoria, Chapter 100, and 24 and 25 Victoria, Chapter 73.

By 5 and 6 Victoria, Chapter 100, An Act to consolidate and amend the Laws relating to the copyright of designs for ornamenting articles of manufacture, it is enacted that:—"With regard to any new and original design, whether such design be applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural, and that whether such design be so applicable for the pattern, or for the shape and configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing, or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined, the proprietor of every such design not previously published either within the United Kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substances as aforesaid, *provided the same be done within the United Kingdom of Great Britain and Ireland.*"

And by Section 4 it is provided that "no person shall be entitled to the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture, or any such substance, unless such design have before publication thereof been registered according to this Act."

The 24 and 25 Victoria, Chapter 13, after reciting the 5 and 6 Victoria, Chapter 100, and that it is expedient that the provisions of the recited Act "should apply to *designs*, and to the application of such designs, within the meaning of the said Acts, whether such application be effected within the United Kingdom or elsewhere," enacts—"That the said recited Act, and all Acts extending or amending the same, shall be construed as if the words 'provided the same be done within the United Kingdom of Great Britain and Ireland' had not been contained in the said recited Act; and the said recited Act, and all Acts extending or amending the same, shall apply to every such design as therein referred to, whether the application thereof be done within the United Kingdom or elsewhere, and whether the inventor or proprietor of such design be or be not a subject of Her Majesty."

The 7th Section of 5 and 6 Victoria, Chapter 100, "for preventing the piracy of registered designs," enacts: "That during the existence of any such right to the entire or partial use of any such design, no person shall either do, or cause to be done, any of the following Acts with regard to any articles of manufacture or substance in respect of which the copyright of such design shall be in force, without the license or consent in writing of the registered proprietor thereof (that is to say:—)

"No person shall apply any such design or any fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article of manufacture, or any substance, artificial or natural, or partly artificial and and partly natural:—

"No person shall publish, sell, or expose for sale, any article of manufacture, or any substance, to which such design or any fraudulent imitation thereof, shall have been so applied, after having received either verbally, or in writing, or otherwise from any source other than the proprietor of such design, knowledge that his consent has not been given to such application, or after having been served with or had left at his premises a written notice signed by such proprietor or his agent to the same effect."

The 8th Section provides for the recovery of penalties for piracy of the design, and the 9th Section empowers "the proprietor "in respect of whose right such penalty "shall have been incurred (if he shall elect "to do so) to bring such actions as he may "be entitled to for the recovery of any "damages which he shall have sustained,

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"either by the application of any such de-
"sign, or of a fraudulent imitation thereof,
"for the purpose of sale to any articles of
"manufacture."

The effect of Act 5 and 6 Victoria, Chapter 100, appears to us to have been this, —that the owner or proprietor of any design registering the same under the Act, if such design was applied to the ornamenting of any article of manufacture in England, acquired a right to prevent any person from applying the design, or any fraudulent imitation of it, to any articles of manufacture, or from selling any articles to which the design is applied. But the extent of such prohibition must have been, and was, measured by the extent to which the provisions of Act 5 and 6 Victoria applied. Now Act 5 and 6 Victoria did not extend to India, and therefore there is nothing in that Act which would have prevented any person from applying any registered design, or selling any article to which such design had been applied in India.

Act 24 and 25 Victoria was passed immediately prior to the Exhibition of 1862, and it extended the privileges conferred by Act 5 and 6 Victoria, Chapter 100, to the case of designs registered in England, whether the application of such designs to articles of manufacture was effected either within the United Kingdom or elsewhere. But there is nothing in 24 and 25 Victoria, Chapter 73, which extended the prohibition of the application of such design, or the sale of articles to which such design had been applied, to India or the Colonies, or to any other place to which Act 24 and 25 Victoria did not extend.

We are, therefore, of opinion that the decision of the Recorder is correct, and that a registered proprietor of a design within the United Kingdom could not sustain an action against a person who applied such design, or who sold any articles to which such design had been applied in British Burmah.

The learned Advocate-General has attempted to rest the case on another ground, namely, that the plaintiff had a right in this design analogous to the right which a merchant may have in his trade mark.

We think that there is no foundation for such a contention. A *design* for ornamenting an article of manufacture is not an indication that such article is manufactured by a particular house, and there is no allegation in the plaint that the defendants used the design in question, the same being the property of the plaintiffs, for the purpose of fraudulently pretending or causing it to be believed that the articles so sold by the defendants were articles manufactured, selected, or printed by the plaintiffs. The two subjects, the property in a trade mark and the property in a registered *design*, are two rights totally distinct in their nature. The right put forward in the present case is simply a right in a design for ornamenting an article of manufacture, and such right is not infringed by the sale in British India of articles to which the design has been applied.

We are of opinion, therefore, that the decision of the Recorder is correct and that it must be affirmed.

The unsuccessful party, the plaintiffs, will pay the defendants 30 gold mohurs as the costs of this reference.

The 22nd June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Sale for arrears of rent—Suit by share-holder.

Cases Nos. 2525 and 2526 of 1870.

Special Appeals from a decision passed by the Judge of Patna, dated the 1st September 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 14th June 1870.

Hurhur Singh and others (Defendants) *Appellants,*

versus

Mussamut Ooma Kooer (Plaintiff) *Respondent.*

Baboos Dwarkanath Sein and *Hem Chunder Banerjee* for Appellants.

No one for Respondent.

In a suit to recover a share of a holding, the whole of which had been sold in execution of a decree for arrears

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of rent, the plaintiff who claimed to hold a divided portion of the tenure was held bound to prove either that such division had been recognized and ratified by the zemindar or that the latter received rent from him, *i. e.*, he would have to prove his *status* as tenant in respect of the share in question.

Jackson, J.—THIS suit related to 26¼ beegahs of land claimed by the plaintiff as a jote. This quantity of land, whether the plaintiff had a title to it or not, was admittedly a moiety of 52½ beegahs held as a jote originally by one Tuhul Roy. It seems that Tuhul Roy had two sons, Khekur and Gunga, and the plaintiff is the widow of Khekur's son, Toolsee.

The zemindar, in the year 1865, got a decree against Gunga by confession of judgment for arrears of rent in respect of these 52½ beegahs. In 1868, upon the zemindar attaching the crops of this same holding, the present plaintiff, Ooma Kooer, claimed and recovered in the Revenue Court damages from him in respect of the wrongful attachment of 26¼ beegahs.

In 1869, the zemindar again sued Gunga for arrears of rent on the entire holding of 52½ beegahs. Gunga then denied that he held any portion of this land, stating that the half of it was held by Ooma Kooer, plaintiff, and the other half by his own son, Madho. The Deputy Collector, however, overruled this defence and gave the zemindar a decree against Gunga for rent of the whole 52½ beegahs. In execution of that decree the holding of 52½ beegahs was put up for sale. Ooma Kooer, under Section 106 Act X of 1859, put in a claim, which claim was overruled and the entire tenure was sold; and Ooma Kooer, plaintiff, now sues the decree-holder and the purchaser to recover back her 26¼ beegahs.

The Moonsiff who tried the suit found the demand to be collusive and dismissed it; but on appeal, the Zillah Judge, relying very much, as it seems to me, upon the judgment obtained by Ooma Kooer for damages, reversed the decision of the Moonsiff and gave her a decree for 26¼ beegahs out of 52½ beegahs which the original holding comprised. The Judge considers apparently that the decision of the Deputy Collector upon Ooma Kooer's suit for damages amounted to conclusive proof that the original holding of 52½ beegahs had been divided into two parts, of which one moiety was held by Ooma Kooer, and that the zemindar had, by compulsion of Court, recognized such division. He also considers that there was evidence, which, I suppose, is oral evidence, showing that Ooma Kooer had in fact held the 26¼ beegahs.

Now, as the case stands, this holding of 52½ beegahs has been held by a competent Court to have fallen into arrear by the default of the tenant Gunga, and has been sold notwithstanding the claim put in by the present plaintiff. The plaintiff, therefore, might bring a suit within one year from the date of her claim being overruled under Section 107 Act X of 1859; or she might, generally, as held in a Full Bench decision of this Court to be found in V Weekly Reporter, page 22, Act X Rulings, sue to set aside all the proceedings if she could make out a case of fraud. But before she could succeed in either of these cases she would have to show, I think, that there had been an actual division of the holding of 52½ beegahs, and that such a division had been recognized and ratified by the zemindar; for otherwise the zemindar would be perfectly justified in proceeding against the registered holding and in putting it up for sale. The plaintiff might prove either that such division of the tenure had been registered and recognized, or she might prove payment of rent by her and receipt of rent from her by the zemindar; but, at any rate, she would have to prove her *status* as a tenant in respect of the 26¼ beegahs.

This bearing of the case appears to have been overlooked by the Judge of the Lower Appellate Court. I think, therefore, that the case must go back in order that this point may be considered and it may be found whether the plaintiff has brought herself within the conditions which I have stated, because if she does not, I think the suit must be dismissed. It will be remanded, therefore, for a new trial to the Zillah Court, and that Court will take it up out of its turn and dispose of it with as little delay as possible.

I may observe that we have not in this case had the assistance of the vakeel for the special respondent, and have had some difficulty in dealing with the matter in his absence.

Macpherson, J.—I concur.

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The 22nd June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Tenants-at-will—Accretions.

Case No. 273 of 1870.

Regular Appeal from a decision passed by the Judge of Patna, dated the 23rd September 1870.

Bhuggobut Pershad Singh and others (Defendants) *Appellants,*

versus

Doorg Bijoy Singh (Plaintiff) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Sreenath Doss for Respondent.

As between himself and the zemindar, a ryot is entitled to any accretion to his holding formed by the recession of the river, and the fact of his being a mere tenant-at-will does not entitle the zemindar to turn him out of the accretion while he retains as tenant the original holding.

Jackson, J.—THE plaintiff sued to recover possession of 95 beegahs of land in a *deara*, which land he alleged to have been gradually formed by accretion by the receding of the river Ganges, and as an accretion to his original holding of 9 beegahs and 9 biswas of land in the same *deara.*

The defendants are partly persons now claiming to hold this land under lease from the zemindars, and partly the zemindars themselves.

It may be mentioned, although the argument does not turn upon that part of the allegations, that the plaintiff is himself a co-proprietor of the estate in which these lands are situated, and that the plaintiff as well as the defendants claim to hold, in the way of individual occupation, parcels of lands being parts of that estate.

The plaintiff alleged that he held the lands after accretion, and that such holding had been recorded by an Ameen deputed by the settlement officer ; and he also referred to certain disputes and a litigation which had gone on between him and some of the defendants in respect of part of these very lands. He further stated that a second Ameen having been deputed by the settlement officer, he measured and recorded these lands as being held by the defendants ; that he, the plaintiff, complained of these proceedings, but his complaint was disallowed by the Deputy Collector and afterwards by the Collector ; that since the recording just mentioned by the second Ameen, some of the defendants had been in possession of the lands and paid the rents to the other defendants.

The defendants' case, generally speaking, was a denial of the *kasht*, or holding of the plaintiff ; a denial that the plaintiff had any right to hold the land as an accretion to his original holding, and an assertion of the right of the defendants in occupation who were holding by permission of the landlord.

The Judge of Patna, Mr. Ainslie, before whom this case came on for trial, found that the ryots on the *deara* were not liable to be ousted at will, and secondly, that the plaintiff was more than a tenant-at-will: he also found that the land in question was an accretion to the plaintiff's original holding, and he held that by Article I, Section 4, Regulation XI of 1825, the plaintiff was entitled to that accretion as part of his holding, and therefore considered that plaintiff was entitled to recover the land.

This decision has been assailed wholly upon grounds of law. The vakeel for the appellant has not, in his argument before us, touched the findings of fact by the Judge, nor questioned the Judge's opinion upon the evidence. We must, therefore, assume the facts as found by the Judge and apply the law to them.

It seems to me quite clear that the plaintiff's original holding being assumed and the land being found to be an accretion to that holding, the plaintiff is entitled to such accretion by the distinct and positive terms of Section 4 Regulation XI of 1825.

Great stress has been laid upon a recent decision of the Privy Council in the case of Lopez against Muddun Mohun Thakoor.* In that case, the Judicial Committee, overruling the decision of a Full Bench of this Court, determined broadly that a zemindar was not entitled to claim lands as an

* 14 W. R., P. C., p. 11.

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accretion to his estate when such lands are capable of being identified as a reformation of land belonging to another owner upon their original site.

It appears to me that that case does not apply to the present circumstances. There is no contest here, to use the words of the Judicial Committee, "between surface and "site." It is not the case here that the plaintiff is claiming to recover this land as an accretion to his holding and the defendants are claiming it as a reformation on their own holding upon the original site; but the defendants now in occupation claim it under a title made from the zemindar. It appears to me that, as between the ryot and the zemindar, if the tenant can show that the land in dispute is an accretion to his original holding he is entitled to succeed.

Then it is said that the original holding is a mere tenancy at will and that consequently as the plaintiff could not enforce a claim to be put in possession of such holding, he cannot *a fortiori* be entitled to recover possession of land which has accreted to his holding.

Now, it is not very clear (but it is not necessary to determine here) how a party who is a joint owner of an estate and in possession of land within the limits of that estate, can be called, in respect of such occupation, a tenant-at-will under the proprietary body. But however that may be, and assuming for the moment that the plaintiff is a mere tenant-at-will, that will not entitle the zemindar to dissociate the accretion from the original grant and to turn the plaintiff out of the accretion, while he still retains as tenant the original holding itself. If the zemindar desires to oust the plaintiff from the accretion that he holds, he must do so by attacking the original holding. He has not attempted to proceed in that way, nor has there been any issue whether the zemindar would be entitled to oust the plaintiff from the holding or not. So long, therefore, as the plaintiff occupies his original holding, I conceive he is entitled to occupy the accretion which under the law forms part of it, and therefore he is entitled to be restored to possession of it by decree of the Civil Court.

For these reasons, I think the decision of the Court below is quite correct and that the appeal ought to be dismissed with costs.

Macpherson, J.—I concur.

The 22nd June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Mortgaged property—Cause of action—Limitation.

Case No. 2530 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 2nd September 1870, *affirming a decision of the Sudder Moonsiff of that District, dated the 27th June* 1870.

Ram Dhun Bhuggut (Plaintiff) *Appellant,*

versus

Guneshee Mahtoon and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Opendro Chunder Bose for Respondents.

The sale of mortgaged property by the heirs of a mortgagee after it has been held and enjoyed by them upwards of 60 years, does not give a fresh cause of action to the representatives of the mortgagor.

Jackson, J.—In this case Mr. Twidale's contention is that his client being the representative of a mortgagor, and the mortgaged property having been purchased by the defendants from the representatives of the mortgagee, his cause of action arose at the date of the purchase, and the time allowed for enforcing that cause of action is 60 years from the date of the purchase.

It appears to me that that contention is altogether untenable. What the Legislature intended by Section 5 Act XIV of 1859 was to give a cause of action and to limit the arising of that cause of action in the case of property which had been purchased *bonâ fide* and for valuable consideration from a depositary, trustee, mortgagee, or pawnee, for the trial of which cause of action the ordinary rule as to moveable and immoveable property would have to be applied; and then, by way of proviso on that rule, it was laid down that in the case of a purchase from a depositary, pawnee, or mortgagee, no such suit could be maintained unless brought within the time limited by Clause 15, Section 1, that is, within 60 years from the time of deposit, pawn, or mortgage.

In the present case, the mortgage took place 127 years ago. Since that time there

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appear to have been several purchases, and it is alleged that the latest purchase was within 12 years of the suit. The Legislature could never have intended to provide that after the heirs of the mortgagee had enjoyed and held the mortgaged property for 100 years or 200 years, the sale by one of their descendants should give a fresh cause of action, which might be enforced within 60 years, to the heirs of the mortgagor.

I think the special appeal must be dismissed with costs.

Macpherson, J.—I am of the same opinion.

The 22nd June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Transfer of tenures—Zemindar's consent—Gomashta's receipts.

Case No. 233 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 23rd July 1870.

Bhojohuree Bunick (one of the Defendants) *Appellant,*

versus

Aka Golam Ali (Plaintiff) *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondent.

The purchaser of a ryotee tenure is bound to communicate with the zemindar and obtain his consent to the transfer of the tenure; without this being done, a gomashta's receipts of rent are not binding on the zemindar.

Jackson, J.—We think that it is unnecessary to call upon the respondent in this case. We are not satisfied that we ought to interfere with the decision of the lower Court.

The suit was brought to set aside as invalid certain deeds of sale, which had been executed by the defendants, tenants, in favor of one Bhojohuree Bunick.

The lower Court, being the Court of the Subordinate Judge of Furreedpore, has decreed the plaintiff's claim, and from that decision this appeal is preferred to this Court.

The facts of the case appear to be these. Defendants Nos. 2, 3, 4 and 5 are ryots holding tenures of some extent and value under the plaintiff, their zemindar. These tenures they have sold to the defendant No. 1. The sale does not apparently carry with it possession of the tenures, but is entered into with the reservation that Bhojohuree Bunick shall allow these ryots to remain in possession, he himself only receiving rent from them. These facts are not distinctly stated by the defendants, but they have come out in the course of the hearing of the appeal before us; and there seems to be no denial that these facts are the real facts of the case. Bhojohuree Bunick has not paid the real value of these tenures, and we are told that he has not done so because he is obliged under the agreement to retain the tenants in the same position in which they were before.

The plaintiff has brought this suit to set aside these sales as illegal. The questions which were tried in the lower Court were, first, whether the defendants had been able to prove that the tenures of the ryots came under the description of kyamee and mokurruree. This the Judge of the lower Court has decided against the defendants, and it is admitted here that there is no evidence of any kyamee mokurruree jote.

Then, secondly, it is alleged that even though they were not kyamee jotes, still such jotes are under the custom of the country transferable. It does not appear that there has been any evidence taken upon this question, nor was that one of the points pleaded before the lower Court. And we think we may say that even if it had been pleaded, it is impossible that there could be a custom to sell jotes without actual transfer of the jotes. In this case, there has been no actual transfer of the tenures. The effect of the sale in fact has been merely to place a middleman between the ryot and the zemindar.

Lastly, it has been contended in this case that the zemindar acquiesced in these sales. There is no attempt to show that the ryots went to the zemindar to obtain his acquiescence. But it is said that his gomashta received rent for two years, and that the gomashta of the ijardar received the rent of the 3rd year. It seems to us almost impossible that the gomashta could have under the circumstances received the rent. The Judge of the lower Court says that the gomashta denied that the dakhillahs put in were

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signed by him. We cannot find any such denial upon the record. If we had found any such denial, we should have felt inclined to place credit upon it. But even if it is the case that the gomashta gave these receipts, we think that such giving of receipts by a gomashta for one or two years will not bind the zemindar. It was the duty of the person who purchased the tenure of the zemindar's tenants, to have entered into communication with the zemindar himself and to obtain his consent to the transfer of the tenure. It is quite evident on the facts of this case that this transfer was made in order to defeat the zemindar, and that the zemindar would not have under any circumstances acquiesced in any such arrangement.

Under these circumstances, we dismiss this appeal with costs.

The 22nd June 1871.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Suit—Mortgagee—Lien.

Case No. 273 of 1871.

Special Appeal from a decision passed by the 1st Subordinate Judge of Shahabad, dated the 30th November 1870, reversing a decision of the Moonsiff of Sasseeram, dated the 24th June 1869.

Ram Yad Singh (Defendant) *Appellant,*

versus

Lalla Saligram Singh (Plaintiff) *Respondent.*

Baboo Doorga Mohun Dass for Appellant.

Baboos Aubinash Chunder Banerjee and *Annund Chunder Ghossal* for Respondent.

When a mortgagee sues to enforce his lien on property which has intermediately passed by sale into other hands, he is bound to bring his action not against the mortgagor alone but also against the parties in possession.

Loch, J.—On the 12th June 1861, Gooman Bhunjun Singh gave a zur-i-peshgee lease for 10 years for rupees 3,000 to one Saligram Singh, Oogro Narain Singh, and Sheo Buksh Singh in the following proportion, *viz.*, Oogra Narain six annas, Saligram 8 annas, and Sheo Buksh Singh 2 annas, of Mouzah Burdeha, the property now in dispute. On the 19th July 1864 Gooman Bhunjun Singh sold the whole village to Gopal Narain Singh and Bheekun Lall for 8,000 rupees, under two kobalahs bearing date the 19th July 1864. Previous to this sale to Gopal Narain and Bheekun Lall, it appears that Gooman Bhunjun Singh mortgaged this property to one Ram Yad Lall on the 15th January 1862. Ram Yad Lall brought an action to recover the amount due to him in 1865 and obtained a decree; and on the 8th April 1867, in execution of that decree he caused the rights and interests of his debtor in the said property to be sold, and purchased them himself. Subsequently, in a suit brought by Gopal Narain and Bheekun Lall against certain tenants for arrears of rent under Act X of 1859, Ram Yad Singh intervened. His intervention was allowed and the suit was dismissed. The plaintiffs now bring the present suit to recover possession, claiming their right to hold the lands under their zur-i-peshgee lease. It is contended by the defendant that Saligram Singh is the son of Bheekun Lall; that Oogro Narain is the brother of Gopal Narain Singh; that all their transactions are joint; and that when the purchase in the names of Gopal Narain and Bheekun Lall was made on the 29th July 1864, the mortgage in favor of Saligram and Oogro Narain merged therein, the amount of the zur-i-peshgee lease, *viz.*, rupees 3,000, being credited as part of the purchase-money. And it is contended that this being the case, Saligram Singh and Oogro Narain Singh have no standing in Court.

The first Court dismissed the suit. On appeal, the Lower Appellate Court considered that there was no proof whatever of the 3,000 rupees, the amount of the loan to Saligram and Oogro Narain having been credited as part of the purchase-money, and it reversed the order of the first Court. The reasons given by the Lower Appellate Court for the conclusion to which it has come are by no means satisfactory; and the Judge certainly appears to have missed one or two of the chief points in the case. The first point which he ought to have disposed of was the allegation made by the defendant that Saligram Singh, Oogro Narain Singh, Gopal Narain, and Bheekun Lall were in fact all one in their transactions. Secondly, he has made a mistake in rejecting the evidence of the writer of the

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deeds, *viz.*, the zur-i-peshgee of 1861 and the kobalah of 1864, merely on the ground that he was the servant of the defendant. But the respondent in this case in special appeal is willing to accept the allegation made by the special appellant. He says—admitting that Saligram, Oogro Narain, Gopal Narain and Bheekun Lall were all one in their transactions and that the zur-i-peshgee did merge in a subsequent sale of 1864, and admitting also that Ram Yad Singh held the mortgage deed bearing date the 15th January 1862,—yet previous to the suit brought by Ram Yad Singh to recover his money, the whole of the rights and interests which Gooman Bhunjun had in the property passed under the sale of the 19th July 1864 to Gopal Narain and Bheekun Lall; and under these circumstances, if Ram Yad wanted to enforce his lien on this property, he was bound to bring his action not only against his debtor, but also against the party who was in possession of the property, because at that time the debtor had no further right or interest in the property, nor was he in possession. We think that this contention is good. And as it is clear that Ram Yad brought his action merely against his debtor Gooman Bhunjun Singh, he cannot, under any sale which took place in execution of a decree against him, resist the entrance of the plaintiffs both as mortgagors in 1861 and purchasers in 1864.

We, therefore, dismiss this special appeal; but as it has been decided on a point not before the lower Court, each party will bear his own costs in this litigation.

The 23rd June 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Idols—Right to perform Poojah.

Case No. 202 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 22nd December 1870, *reversing a decision of the Moonsiff of that District, dated the 23rd May* 1870.

Maharanee Indurjeet Kooer (one of the Defendants) *Appellant,*

versus

Chundemun Misser (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Umbica Churn Bose for Respondent.

The owner of an idol is entitled to appoint any body he likes to perform its poojah; the mere fact of a party and his ancestors having done so for a long period creates no right in his favor.

Mitter, J.—THIS was a suit instituted by the plaintiff, now respondent before us, to establish his exclusive right to perform the poojah of an idol called Boodhwa Mohadeo, and to recover rupees 33 alleged to have been misappropriated by one Debee Dutt who claims to be the poojaree of the idol by virtue of an appointment made in his favor by the defendant Maharanee Indurjeet Kooer.

The defence set up by Maharanee Indurjeet Kooer was to the effect that the idol belonged to her and that she was therefore competent to appoint any body she liked to perform the poojah.

Upon these pleadings, one of the issues laid by the first Court was whether the *asthan* of the idol Boodhwa Mohadeo belonged to the intervenor, that is, to the defendant Maharanee Indurjeet Kooer; but without coming to any express finding on this point upon the ground that the Maharanee's title to the idol was not disputed by the plaintiff, that Court dismissed the suit holding that a suit of this description could not be maintained in the Civil Court.

On appeal, the Subordinate Judge has reversed the decision of the first Court solely and exclusively upon the ground that the plaintiff and his ancestors had been performing the poojah of the idol for a very long period of time and that the plaintiff was therefore entitled by "a customary right" to perform the poojah.

We think this decision is erroneous. The first point to be determined in this case was whether the idol in question belonged to the defendant Maharanee Indurjeet Kooer or not. If this point is determined in the affirmative either upon the admission of the plaintiff, of which, however, we do not find any trace on the record, or upon other legal evidence, it is clear that the defendant Maharanee Indurjeet Kooer would be entitled to appoint any body she likes to perform the poojah, and the mere fact that the plaintiff and his ancestors had been allowed to perform it for a long period of time would create no right in his favor.

We, therefore, reverse the judgment of the Lower Appellate Court and remand the case

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to that Court to try the issue whether the idol in question belongs to Maharanee Indurjeet Kooer, after giving to the parties full opportunity to produce such evidence as they might consider necessary. If this question be determined in favor of Maharanee Indurjeet Kooer the plaintiff's suit must be dismissed. If, on the contrary, it is found that the idol is a public idol and that the plaintiff and his ancestors had been from time immemorial performing the poojah of the idol under a sort of prescriptive title, the plaintiff would be entitled to a decree.

The costs of this appeal and of the Lower Appellate Court will abide the ultimate result.

As this case appears to have been instituted in 1869, we think the Subordinate Judge ought to take it up out of its turn and decide it without any unnecessary delay.

The 23rd June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Withdrawal of plaint—Section 97, Civil Procedure Code.

Case No. 2627 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 18th August 1870, affirming a decision of the Subordinate Judge of that District, dated the 8th February 1868.

Koomar Poresh Narain Roy (Defendant) *Appellant,*

versus

Ranee Surut Soonduree Debee (Plaintiff) *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Where a plaintiff asks for permission to withdraw his plaint saying that it will be out of his power to adduce the evidence, which he points out as existing in certain records, within the period fixed by the Court for hearing the case, the Court is competent, under Section 97 Act VIII of 1859, to grant him permission to withdraw the suit.

Kemp, J.—THE grounds taken in this special appeal are, 1st,—that the order of the Moonsiff permitting the plaintiff to withdraw his case is not in accordance with the provisions of Section 97 of Act VIII of 1859; and 2nd,—that the finding of the Lower Appellate Court as regards plot 3 is not sufficient to entitle the plaintiff to a decree.

On the first point, a decision of the Privy Council to be found in Volume XII, Weekly Reporter, page 13, is quoted, but that was an appeal from a decision passed before Act VIII of 1859 came into operation; and moreover in that case it appears that issues had been joined and the party having failed to produce the evidence which he was bound to produce in support of the issues, liberty to bring a fresh suit ought not to have been granted.

In this case, the plaintiff, on a day being fixed for the hearing of the case, petitioned the Court saying that it would be out of his power to adduce the evidence which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, and he therefore asked the Court for permission to withdraw his plaint; and the Court being competent under the provisions of Section 97 to grant the permission asked for, did give such permission. We may also observe that although this case has been twice remanded, this point was not taken on any of the previous occasions when the case was before this Court, and it is therefore overruled.

On the second point, it is clear that the Judge has come to a decision upon the question whether plot No. 3 in dispute belongs to the plaintiff's talook, and he has clearly found that it does.

We, therefore, dismiss the special appeal with costs.

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The 23rd June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Butwarrah—Section 73 Act VIII of 1859.

Case No. 16 of 1871.

Application for Review of Judgment passed by the Hon'ble Justices F. B. Kemp and F. A. Glover, on the 25th February 1871, *in Special Appeal No.* 1997 *of* 1871.

Joy Kishen Mookerjee, Defendant (Appellant) *Petitioner,*

versus

Raj Kishen Mookerjee, Plaintiff (Respondent) Opposite Party.

The Advocate-General and *Mr. G. A. Twidale* for Petitioner.

Baboos Bama Churn Banerjee and *Umbika Churn Banerjee* for Opposite Party.

In a suit for a butwarrah on the allegation that defendant had encroached upon certain ijmalee lands, the latter urged that the said lands were not ijmalee but the self-acquired lands of his (defendant's) son, who ought to be made a party:

Held, on review of a previous decision, that as the son's interest was not adverse both to plaintiff and defendant, unless the point raised was cleared up, the butwarrah could not stand, and the son must therefore be made a party under Section 73 Act VIII of 1859.

Kemp, J.—THIS is an application on the part of Baboo Joy Kishen Mookerjee, special appellant, for the admission of a review of judgment of a decision passed by this Court on the 25th of February last, affirming a decision of the 2nd Subordinate Judge of Hooghly, dated the 20th of May 1870.

It appears that in this case, the respondent, Baboo Raj Kishen Mookerjee, the brother of the applicant for review, applied for a butwarrah of a small quantity of land which he alleged to be 6½ cottahs situated in the town of Ootterparah. In his plaint, he alleges that the defendant Joy Kishen had encroached upon certain ijmalee lands and therefore the plaintiff sought to have a butwarrah made. The defendant in that case, Joy Kishen Mookerjee, stated that the lands upon which the plaintiff alleged that he, Joy Kishen, had encroached upon were not the ijmalee lands but were the self-acquired lands of Huro Mohun, the son of Joy Kishen Mookerjee, and that Huro Mohun ought to be made a party to the suit. The first Court, on this question whether Huro Mohun ought to be made a party or not, relied upon a decision to be found in Volume VII of the Weekly Reporter, page 201, and ruled that Huro Mohun's application to be made a party must be rejected. Joy Kishen appealed upon this point and his appeal was unsuccessful. In special appeal the point was again raised, and in our decision we remarked that the only point pressed upon our attention was the question whether Huro Mohun ought to have been made a party to the suit under Section 73 of the Code of Civil Procedure. We were then of opinion that it was proper to follow the ruling laid down in the case of Joy Gobind Dass *versus* Gouree Pershad Shaha and others, reported in Volume VII, Weekly Reporter, page 201. We were also under the impression, an impression which has been now removed after further argument, that Huro Mohun claimed an interest adverse both to the plaintiff, his uncle, and to the defendant, his father, and that therefore no decree for partition of the ijmalee land as between the father and the uncle could affect Huro Mohun.

After hearing the arguments on both sides, we are of opinion that our decision of the 25th of February last is incorrect. It appears that the interest of Huro Mohun is not adverse both to the plaintiff and the defendant in the case. It is clear that unless the point is cleared up whether these lands which the plaintiff alleges Joy Kishen has encroached upon are ijmalee lands, as stated by the plaintiff, or the self-acquired lands of Huro Mohun, as alleged by the defendant, the butwarrah which has been made on the footing that they are ijmalee lands cannot stand. We, therefore, remand the case and direct that Huro Mohun be made a party to the suit under Section 73 of Act VIII of 1859, and a fresh decision in his presence be passed.

The remaining ground of review was not pressed upon us when the case was heard in special appeal, and in our order admitting this review we reserved our judgment on the 2nd ground until we could refer to our notes, and having done so we find that no argument was pressed on this Court with

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reference to the second ground taken in review, and we therefore refuse to enter into that ground. The case must be remanded for the purpose of making Huro Mohun a party to the suit and passing a fresh decision in his presence.

Costs to follow the result.

The 23rd June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jungle land — Possession — Limitation.

Case No. 17 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 5th December 1870, *affirming a decision of the Subordinate Judge of that District, dated the* 17*th December* 1868.

Rajah Leelanumd Singh and others (Plaintiffs) *Appellants,*

versus

Mussamut Basheeroonissa and others (Defendants) *Respondents.*

Messrs. Mun Mohun Ghose and *R. E. Twidale* and *Moonshee Mahomed Yusoof* for Appellants.

Mr. C. Piffard for Respondents.

In a suit for possession of jungle lands, where there is no proof of acts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong.

Mitter, J.—We are of opinion that this case ought to be remanded to the Lower Appellate Court for a fresh decision.

The whole of the Judge's judgment is contained in the following passage :—

"This suit is remanded by the High Court "under judgment dated 13th July 1870. It "appears this Court erroneously wrote "'possession' while the context clearly "shows 'title' the proper term, inasmuch "as the word title was used at the com-"mencement of the paragraph.

"The Subordinate Judge disbelieved the "oral evidence in support of possession for "reasons duly set forth by him; and *taking "their evidence per se*, I see no ground for "differing with him as to the degree of credit "to be attached to it in proof of possession "so as to remove the statutory bar to the "suit."

Assuming, however, that the word "pos-"session" had been used by mistake for the word "title" as the Judge says, the correctness of the order of remand passed by this Court would still remain unimpeachable. The only issue which the Judge had to try was that of limitation, and it is clear that a mere finding to the effect that the plaintiff had a title in 1821 or even in 1837 could not possibly meet the requirements of that issue.

But be this as it may, the Judge is wrong in rejecting the oral evidence produced by the plaintiff without considering that evidence in conjunction with the documentary proofs on the record, and the probabilities arising from all the surrounding circumstances of the case. There was nothing in the order of remand to justify such a course of procedure, and we need scarcely say that it is one by no means calculated to promote the discovery of truth. The only satisfactory mode of dealing with a disputed point of fact is to consider the full force and joint result of all the evidence, direct or presumptive, bearing upon that point, and this precaution is no where more necessary than in this country where oral evidence *per se* is looked upon with so much distrust. In the present case, the plaintiffs have produced a large number of documents, consisting of dakhilahs, farkhutees, jumma-bundee papers, and decrees of Court, to prove their *possession and title*, and there is every reason to believe that if these documents had been considered in conjunction with the oral evidence of possession, the Judge would not have rejected that evidence without at least calling upon the defendant to rebut it.

The Subordinate Judge who tried this case in the first instance says "plaintiffs have "examined some of the ryots, but none of "these have been able to produce their pot-"tahs. In the absence of pottahs and kubo-"leuts, *it is impossible to say* what lands

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"were cultivated by the witnesses. Therefore, the exact position of the ryots' holdings cannot be ascertained. The receipts and farugs filed by them prove nothing except that they are ryots and have paid rent, but of lands the position of which it is impossible to make out. The mofussil papers filed by the putwaree prove nothing, for in them there is only mention made of the names of the ryots from which nothing in favor of the plaintiffs could be deduced, for they may be ryots of other lands not in dispute."

Now, there is nothing on the record to show that these ryots had any pottahs to produce, or that they had executed any kubooleuts in favor of the plaintiffs. No question appears to have been put to them on this point, and we do not see any reason why the Subordinate Judge should have thrown any discredit upon their testimony for their inability to produce documents, the existence of which has not been proved in any manner whatever. With reference to the difficulty felt by the Subordinate Judge in ascertaining the identity of the lands referred to by them, we have simply to observe that their depositions are clear and express on the point, and the objection against the mofussil papers filed by the putwaree is completely removed by the evidence of the putwaree himself, who distinctly swears that the ryots whose names are mentioned in those papers are ryots of the disputed lands.

There is another point in this case which seems to have been overlooked by both the lower Courts. The plaintiffs alleged that the lands in question had remained in a state of jungle down to the year 1269, which is well without 12 years prior to the institution of this suit. If this allegation is correct, the suit would not be barred by the law of limitation, even if the plaintiffs fail to prove that they had exercised any acts of ownership over the disputed lands, unless the defendant can make out a clear case of adverse possession for more than 12 years. (See Full Bench Ruling, Weekly Reporter, Volume III, page 73). We do not mean to say that acts of ownership cannot be exercised over jungle lands, but in the absence of any proof of the exercise of such acts on either side, the possession of such lands must be presumed to have continued with the person to whom they rightfully belong.

We reverse the decision of the Lower Appellate Court and remand this case to that Court with directions to try it with reference to the above remarks. Costs will abide the ultimate result.

The 24th June 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges*.

Breach of contract—Forfeiture—Decree for cancelment of lease—Execution—Possession.

Case No. 103 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 3rd November 1870, *reversing a decision of the Deputy Collector of that District, dated the 28th July* 1870.

Mahomed Faez Chowdhry (Defendant) *Appellant,*

versus

Shib Doolaree Tewaree (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboos Sreenath Dass, Mohinee Mohun Roy and *Rebutty Chunder Banerjee* for Respondent.

Every breach of an agreement for a lease does not entail forfeiture of the lease, but where forfeiture is provided as the penalty for breach of a particular clause it may be enforced for such breach.

A decree for cancelment of a lease is virtually one for possession in supersession of that lease, and may be so executed by a Court under Act X of 1859 by which it has been passed.

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Jackson, J.—THE plaintiff has preferred this suit under Clause 5 Section 23 Act X of 1859, to cancel a lease which he granted in the name of Gooroo Churn Dass to one Bhyrub Chunder Chowdhry, whose rights under the lease had been afterwards sold in execution of decree and had been purchased by the defendant Mahomed Faez Chowdhry. The plaintiff alleged that the defendant had broken a clause of the lease under which the lessee had been forbidden to sub-let by giving a kut-ijarah to one Fara Gazee, and that as it had been distinctly contracted by the lease that if any sub-lease was given the lease would be liable to be cancelled, the plaintiff was now entitled to have the lease cancelled and to obtain possession of the lands.

The first Court held that the Revenue Courts had no jurisdiction in a suit of this description. The Judge also doubted whether the Revenue Courts had jurisdiction to do more than cancel the lease, but on the plaintiff stating that he was willing to take a decree for the cancelment of the lease, the Judge decided that he had jurisdiction and proceeded to try the question raised between the parties. He found that it was not denied that a sub-lease had been given and that there was a clause in the lease declaring it liable to be cancelled if a sub-lease was given. He, therefore, decreed the plaintiff's claim.

On special appeal, it is contended that it is not every act contravening the terms of a lease which will entail a forfeiture of it; that the plaintiff must show that he has suffered some injury by the breach; that the plaintiff waived his rights under the lease when he received rent from the lessee after he had become aware of the breach. In support of the first of these contentions, the precedent of this Court at page 31, Act X Rulings of the Gap Number of the Weekly Reporter, has been referred to. In that case, it is said that although a sub-lease was given against the agreements entered into by the lessee, still the Court held that the lease was not forfeited. We find that in that instance it was held that no real sub-lease had been given; that the lessee still remained in possession of the lands, although he had entered into a contract with a third party regarding the profits he derived from the lease. The case in question cannot therefore be considered in point. But it is also not certain that it is in point in one essential fact. In the lease in this case the clause distinctly stated that if a sub-lease was given, the plaintiff could cancel the lease and re-enter into possession or make other arrangements for the lands. In the lease in that case, it is not clear from the report that any special penalty was stated for a breach of that clause of the lease. We agree with the general principle enunciated in the precedent referred to, that it is not every breach of an agreement for lease which entails a forfeiture of the lease. For instance, a breach of the covenant to pay rent on a certain day would not of itself entail a forfeiture, though if it could be shown that the payment on that particular date was of the essence of the agreement, that such payment was required for a special purpose, and that there was a distinct clause that if such payment was not made on such particular date the lease would be liable to be cancelled—then I am inclined to think that even a breach as to the payment might entail a forfeiture of the lease.

The pleader for defendant referred us to the principle of Equity Law on this point in Story's Equity Jurisprudence. He stated that it was there laid down that if money would compensate for the injury sustained by the lessor and compensation would be given, in such cases a breach of the lease would not entail a forfeiture.

If we apply that rule to this case, it is clear that no compensation could be given in such a case as this. No money injury has been sustained. The injury is not one which can be calculated by any sum of money. There may be numerous reasons for a refusal to allow of sub-letting. Such reasons are not generally recorded, but they can easily be imagined by any person accustomed to deal with such matters. The plaintiff may be willing to sub-let to one person who will collect the rent from his ryots obtaining a fair profit, but he may object that two or three sub-lessees may also be introduced to obtain further contributions from the ryots. Whatever may be his reason, the clause in the lease is clear, and the penalty for breach of that clause is provided. The plaintiff is entitled to enforce that agreement and to cancel the lease.

As to the waiver by the plaintiff, it does not appear that this was urged before the Judge, and it does not appear that there has been any such receipt of rent as would amount to a waiver. No dates of receipt of rents are stated, and it is clear upon

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these proceedings that the plaintiff did not delay to enforce his rights under the agreement of the lessee. There was an attempt to make out that the present lessee was not bound by the terms of the original lessee, but it is clear that he was and that he considered himself bound by them. If not, even the amount of his rent was not settled, but it is certain that he paid the rent as in the lease.

We think that the determination of the Judge is correct, and we dismiss the appeal of the defendant.

The plaintiff has taken a cross-appeal to the effect that he should have a decree both for cancelment of the lease and for possession; that he was ready to take a decree for cancelment of the lease, if he would obtain no further relief, but that the one relief in law involved the other. Against this, Baboo Romesh Chunder Mitter for defendant urges that under the words of the law, though a suit for cancelment of a lease can be brought under Act X of 1869, no mention is made in the law for the giving of possession. He admits that if a decree was obtained to eject a ryot, it might be also a decree for possession; but he says that this cannot be done in a decree for cancelment of a lease, that the decree-holder cannot then and there obtain his full remedy, but he must bring a fresh suit in the Civil Court for possession. We can see no difference in the two suits, and it appears to us that in both cases the plaintiff is entitled as against the party sued to obtain possession. A decree for cancelment of the lease is virtually a decree for possession in supersession of that lease. And to us it appears ridiculous to hold that the Act X Court has not authority to execute its own decree, but that the successful decree-holder must apply to the Civil Court to execute the decree of the Revenue Court. In the precedent* alluded to by the first Court in this case, the Court held that the Civil Court had jurisdiction, but in that case there were other persons also made parties to the suit. The contest was not confined to the landlord and tenant only, and when third parties are made defendants the Revenue Courts have no longer jurisdiction, but it lies with the Civil Courts. We would give the plaintiff a decree to recover possession of the lands covered by the lease from the defendant ijaradar.

The defendant must pay all the costs of this litigation in all Courts.

* 13 W. R., p. 331.

The 26th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Hindoo law—Streedhun—Succession.

Case No. 1198 of 1870.

Special Appeal from a decision passed by the First Subordinate Judge of 24-*Pergunnahs, dated the* 28*th March* 1870, *reversing a decision of the Moonsiff of Alipore, dated the* 1*st September* 1869.

Judoonath Sircar (Plaintiff) *Appellant*,

versus

Busunt Coomar Roy Chowdhry (Defendant) *Respondent*.

Baboos Gopal Lall Mitter and *Grish Chunder Ghose* for Appellant.

Baboos Kalee Mohun Dass and *Oopendro Chunder Bose* for Respondent.

According to the Hindoo Law as current in Bengal, the husband is entitled to succeed to the property which a woman receives from her father either before or after her marriage, in preference to her brother or mother.

Norman, C. J.—THIS is a suit by the plaintiff who claims as heir of his wife Prosunno Moyee to have inherited certain property given to her by the will of her father Huree Narain Mitter. At the time of the death of Huree Narain, Prosunno Moyee was married to the plaintiff. She died under age and without issue leaving her mother surviving her.

The first Subordinate Judge of the 24-Pergunnahs, Baboo Koylash Chunder Deb, reversing the decision of the Moonsiff, Baboo Sham Dhun Mookerjee, dismissed the plaintiff's suit.

From this decision there is an appeal, and the question argued before us was whether the plaintiff as the husband, or the mother, of Prosunno Moyee is the preferential heir.

The Subordinate Judge referred to the Vyavastha Darpana of Baboo Shama Churn Sircar, page 733, in which in the order of succession to a childless married woman's streedhun given by her parents before

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marriage, her fee or gratuity, or bestowed after marriage, the heirs follow each other thus :—

1. The whole brother.
2. The mother.
3. The father.
4. The husband.

The authorities in support of that position are referred to at pp. 720, 721 of the same book.

There seems to be a considerable conflict of opinion between writers on Hindoo Law whether the husband is entitled to succeed to the property of a childless woman received from her parents after the marriage, in preference to her brother, mother, and father. The two texts out of which the dispute arises are to be found in the Dayabhaga, Chapter 4, Section 3. The first is the text of Yajnyavalkya, page 88, Section 2 :—"The separate property of a childless "woman married in the form denominated "Brahma, or in any of the other four un-"blamed forms of marriage, goes to her "husband."

We may premise that the Brahma form of marriage is that which at the present day is ordinarily in use amongst the Hindoos of Bengal, and we think we ought to presume that the marriage was according to that or one of the four other pure forms, in the absence of any suggestion to the contrary.

The passage of Yajnyavalkya above referred to is found somewhat differently translated in Colebrooke's Digest, folio edition, Volume 4, page 309, Verse 501. The translation there given corresponds with the interpretation put upon the text in the Dayabhaga, paras. 4 and 5, where it is said :—"It is not right to interpret the text "as signifying that any property of what-"ever amount, which belongs to a woman "married by any of those ceremonies termed "Brahma, &c., whether received by her "before or after her nuptials, devolves "wholly on her husband by her demise. "For the terms employed in the text signify "'at marriages in the form denominated "Brahma, &c.,' indicate time," &c.

"5. Therefore, the observation of Vishwa-"rupa that the text relates to property "received at the time of the nuptials should "be respected."

After discussing the succession to the property of a woman married in the Asura form, the author in paragraph 10 writes :—"But wealth received by a woman after her "marriage from the family of her father, "of her mother, or of her husband, goes to "her brothers (not to her husband *(a)* as "Yajnyavalkya declares 'that which has "been given to her by her kindred, as "well as her fee or gratuity, and anything "bestowed after marriage, her kinsmen take "if she die without issue." (The same passage from Yajnyavalkya is to be found in Colebrooke's Digest, Volume IV, Verse 508.) After discussing the various texts, the author at paragraph 29 says :—"There-"fore, the property" (which we understand to be property such as is spoken of in paragraphs 10 and 13) "goes first to the whole "brothers ; if there be none, to the mother ; "if she be dead, to the father ; but on failure "of all these, it devolves on the husband. "Thus Katyayana says 'that which has "been given to her by her kindred, goes on "failure of kindred to her husband.'" This passage is referred to in Colebrooke's Digest, folio edition, Volume IV, page 317, note to Verse 511.

The text of Katyayana, Colebrooke's Digest, Volume IV, Verse 512, and the opinion of Raghunanduna may be cited in support of the view that the brother, mother, and father inherit in preference to the husband what was given by the father or mother otherwise than at the time of the nuptials.

On the other hand, it may be observed that the text of Menu, Colebrooke's Digest, Volume IV, Verse 502, is as follows :—"It is "ordained that the property of a woman "married by the ceremonies called Brahma, "Daiva, Arsha, Gandharba, Prajapatya, shall "go to the husband if she die without "issue."

The text of Yajnyavalkya, as printed by the author of the Dayabhaga, is equally general in its terms.

In the summary of Section 3, Chapter 4 by Sreekrishna, Dayabhaga, page 100, it is said :—"In the case of property given by

(*a*) These words are in brackets and are apparently an interpolation. Against them in the note is set the word "*Sreekrishna*", as if Sreekrishna in dealing with the text had inserted them. If so, it would seem to show that he treats the rule to be that stated in paragraph 2, and paragraphs 5, 10 and 29 to be merely parts of a discussion on the true meaning of the text in paragraph 2—not the actual opinions of the author of the Dayabhaga.

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"the father at any other time but the wed-"ding, a maiden daughter succeeds in the "first instance; next a son; then a daughter "who has, and one who is likely to have, "male issue; after them, the daughter's son, "the son's son, the great-grandson in the "male line; the son of a contemporary "wife and her grandson and great-grand-"son in the male line; next to them, the "barren and widowed daughters inherit "together; afterwards the succession pro-"ceeds as before described in the case of "property received at nuptials denominated "Brahma, &c.; that is to say, the order of suc-"cession is husband, brother, mother, and "father."

The same author, Sreekrishna, at page 57 of the Daya Krama Sangraha translated by Wynch, speaking of the property of a woman not received by her at her nuptials, says:—"In default of successors including the "barren and widowed daughters the suc-"cession devolves in due order by the rule "of analogy as in case of wealth, received "at nuptials, *viz.*, on the woman's husband, "brother, mother, and father, if she were "married according to any of the five forms "denominated Brahma and the rest: or if "she were married according to any of the "four styled Asura, &c., on her mother, "father, and husband."—And again of separate property when given to her by her father whether at the time of the wedding or antecedent or subsequent to it, after enumerating the heirs down to barren and widowed daughters, he says the "son and the "rest succeed as in case of property received "at nuptials."

Macnaghten in I Hindoo Law, page 40, adopts the view taken by Sreekrishna.

Sir Thomas Strange in a note prints the summary of Sreekrishna as containing a statement of the order of succession amongst the several heirs with whom we are concerned.

Baboo Prosunno Coomar Tagore, in a "Table of succession according to Hindoo Law as prevalent in Bengal," sets the heirs of a woman's streedhun from husband to father in the following order:—After distinguishing between Yautaka property which a woman receives at the time of her nuptials, Pitridattia that which a woman receives from her parents either after or before her marriage, Anwadhya or Sulko that which she receives from her parent's kindred, her husband or from his relations after marriage, &c., and Ayutaka that which she receives from her son, puts these heirs in the following order: husband, brother, mother, father. *(b)*.

Baboo Gopal Lall Mitter informs us that in the Dya Tatwa it is laid down that as to property of a woman received from her father, the husband succeeds in preference to the mother.

On the whole, we are of opinion that we are bound by the construction put on the texts by Sreekrishna, and that we must pronounce that according to the Hindoo Law as current in Bengal, the husband is entitled to succeed to the property which a woman receives from her father either before or after her marriage, in preference to her brother or mother.

The result will be that the decision of the Subordinate Judge will be reversed and that of the first Court restored with costs in all the Courts.

The 27th June 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Admission of a Pleader—Mahomedan Law—Pre-emption.

Case No. 209 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th November 1870, *affirming a decision of the Moonsiff of that District, dated the 2nd May* 1870.

Hur Dyal Singh (Defendant) *Appellant,*

versus

Heera Lall (Plaintiff) *Respondent.*

(b) In the text of this book, paragraph XV, page 14, the brother is placed before the husband, and both before the mother; but this is an evident mistake, probably a mere blunder of the printer, which escaped observation when the proofs were being corrected.

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Moonshee Mahomed Yusoof for Appellant.

Baboo Nil Madhub Sein for Respondent.

The rule of law is that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong.

A co-parcener has a higher right of pre-emption than a neighbour, and there is nothing in the Mahomedan law to prevent his enforcing his right when the purchaser happens to be a neighbour.

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiff sued as shafee *khullit* for possession of a 4 annas share of certain property.

The defendant also claimed to be a purchaser of the said property.

The first Court found that the statement of the defendant in regard to his being a share-holder of the mouzah in suit was not proved. The first Court also found that the plaintiff had proved and it was not denied that all the preliminaries for pre-emption had been duly performed by him and gave the plaintiff a decree.

On appeal, the Lower Appellate Court recorded as follows:—"During the trial of "the suit, the pleaders for the appellant "admitted that the defendant, appellant, has "no share and partnership in mouzah Go-"peeburna and *therefore* he is not a shafee "*khuleet*, but the appellant is a share-holder "of lot Makrow in which is included mou-"zah Gopeeburna; that the appellant is "a share-holder of mouzahs adjoining to "Gopeeburna, and therefore the defendant, "appellant, is a shafee *jar*; but when the "shafee *jar* has already purchased the pro-"perty claimed under right of pre-emption, "then the plaintiff who is shafee *khullit* "has no right of priority left in it." In this view, the Lower Appellate Court dismissed the appeal and affirmed the judgment of the first Court.

In special appeal, three grounds have been urged before us. The *first* is that upon the finding of the Lower Appellate Court, the appellant is a shafee *jar*, and therefore the plaintiff's suit must be dismissed as the Mahomedan law of pre-emption does not apply to a case in which the purchaser is not a stranger but who is either a shafee *khullit* or shaffee *jar*, and Weekly Reporter, Volume VII, page 260, is cited in support of the contention. This plea, it seems to us, is more ingenious and technical than correct or proper. The question in Volume VII, Weekly Reporter, page 260, was not whether a shafee *khullit* had priority over a shafee *jar* as between the two, but whether either in that case had a right to pre-emption. Thus, as there was no question there as between a shafee *khullit* and a shafee *jar* (as has been decided by the Lower Appellate Court in this case) the case cited does not apply.

The *second* ground taken is that the Lower Appellate Court is wrong in holding that the special appellant was not a shafee *khullit* but a shafee *jar* and that he being really a shafee *khullit*, the plaintiff's suit should have been dismissed.

We have already cited in full the recorded judgment of the Lower Appellate Court which most clearly states that the pleader for the appellant started no claim as shafee *khullit* either for the whole or a portion of the appendages, but laid his claim solely on the ground of being a shafee *jar*. The rule of law is that a judgment deliberately recording the admission of a pleader is to be taken as correct unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong. Not only has this not been done in this case, but a clear statement was made that the appellant was a shafee *jar*; and here (very improperly we think) an attempt has been made to set up quite a new case on the ground that although it was admitted in the Court below that the appellant was *not* a shafee *khullit* and as distinctly admitted that he was a shafee *jar*, being third in the order of preference as enumerated in Macnaghten on the Mahomedan Law, page 48, on the chapter of pre-emption, still he was in reality a shafee *khullit* as to portion of the property. This, we observe, is in the first place opposed to the statements that the special appellant made before the first Court in his written statement; and in the next place it is opposed to the admission made before the Lower Appellate Court that he was a shafee *jar*.

On the question of the priority of the claim of a shafee khullit, it is clear on reference to Hamilton's Hedaya, London edition, Chapter I, that the maxim there laid

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down is that "a partner in the thing itself "has a superior right to one who is only a "partner in its appendages; and a partner "in the appendages of the property precedes "a neighbour;" and reasons are given for that rule.

The *third* ground taken is that the Lower Appellate Court has most arbitrarily dealt with the appellant's evidence to prove the consent of the plaintiff to his purchase, and that such evidence has been rejected for reasons which are not valid in law.

Now the Lower Appellate Court says that it does not believe the oral evidence adduced by the special appellant. The question of the weight of evidence is entirely for the Lower Appellate Court to decide, and it is not for us sitting in special appeal to say that the Lower Appellate Court is wrong in law in attaching greater weight to the evidence of one side than to that of the other, or in disbelieving a certain witness which it is contended it ought to have believed.

We think there is no ground whatever for this special appeal and that this appeal must, therefore, be dismissed with costs.

We take the opportunity here to add with regret that pleaders should understand that they owe a duty to the Court as they do to their clients, *viz.*, that they should place their case before this Court exactly in the same shape as they did before the Lower Appellate Court, unless they can prove most satisfactorily that the record of any admission by any party has been wrongly made by the Lower Appellate Court.

In special appeal, we have simply to see whether the Lower Appellate Court has erred in law upon the facts and upon the pleadings as they are put by the pleaders before that Court, and if those facts and proceedings are entirely changed and put otherwise than they are before us.

Mitter, J.—I am of the same opinion. It is beyond all doubt that a co-parcener has a higher right of pre-emption than a neighbour, and there is nothing in the Mahomedan law to shew that a co-parcener cannot enforce his right of pre-emption when the purchaser happens to be a neighbour. On the contrary, the principle upon which the law of pre-emption is based appears to be clearly applicable to such a case. The other grounds are futile.

The 28th June 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Remand—Witnesses—Act I of 1847—Collector—Jurisdiction.

Case No. 208 of 1871.

Regular Appeal from a decision passed by the first Subordinate Judge of Shahabad, dated the 30th July 1870.

Ram Jewun Singh (one of the Defendants) *Appellant,*

versus

Radha Pershad Singh (Plaintiff) *Respondent.*

Mr. H. C. Marindin for Appellant.

Mr. C. Piffard for Respondent.

Where on a case coming on for hearing before a Court to which it had been remanded, the Judge observed that the evidence of witnesses would be unnecessary, the declaration was held to have sufficiently justified the plaintiffs in making no further application for a summons on their witnesses.

An award of the Collector under Act I of 1847 in respect of boundaries is not final, even though undisturbed on appeal; nor is he competent to do more than demarcate by visible and tangible marks the boundaries between estates and fields.

Jackson, J.—THE position in which this case finds itself is extremely unfortunate. The case has been once already before this Court, and was remanded with a number of other cases by an order of a Division Bench made on the 26th April 1869,* by which order the case was sent back to the Court below, being the Court of the Subordinate Judge of Shahabad, for trial on the merits. The judgment which was followed by that order, disposed of certain questions of limitation on which the Court below had held this and other suits to be barred.

Upon the case going back to the Subordinate Judge, it came on for hearing before Mr. Da Costa, who now holds that office. It appears that the parties had previously put in documentary evidence, and they were allowed by the remand order to add to that evidence; and the plaintiff and the defendant both proposed to call evidence to prove the facts which they respectively alleged. The Subordinate Judge, however, desired to hold an enquiry by an Ameen, and deputed

* 11 W. R., p. 389.

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an Ameen accordingly; and thereupon the plaintiffs requested that the summons to their witnesses might stand over until after the Ameen should have made his report. That was in August 1869. This application was allowed.

Afterwards, in September, the defendants applied for summons to their witnesses, and on that the Court observed that it was a case in which the evidence of witnesses would be unnecessary, as the matters in issue might be determined by reference to documentary evidence, and thereupon the defendant's witnesses were not summoned.

I think we may take it that the declaration by the Court on that occasion sufficiently justified the plaintiffs in making no further application for a summons on their witnesses; and, consequently, whether this order was committed to writing on that occasion, or later, is of little consequence, because that was the view which the Subordinate Judge had taken of the case, and there is no reason to doubt but that he allowed the parties to be aware of it; and consequently the case went to trial without witnesses having been examined on either side.

Upon the documentary evidence, the Subordinate Judge considered that the plaintiffs' right, by force of gradual accretion to the lands in dispute, was fully made out in accordance with Clause I, Section 4, Regulation XI of 1825, and he held that the defendant's objections as to original site, is futile, because he says "under law there "is no right of property in mere original site of alluvial land;" and he refers to the decision of this Court dated 25th June 1860, and others.

The decisions on which the Subordinate Judge based his judgment have been since very materially modified, in fact overruled by the judgment of the Privy Council in the case of Lopez *versus* Muddun Mohun Thakoor.*

The judgment, therefore, being not sustainable upon that point, Mr. Piffard, who appeared for the respondents, contended that the plaintiff was entitled to the judgment of the Court on the ground that he had an award of the Collector of Ghazipore under Act I of 1847 in respect of the boundaries between the estates of the plaintiff and defendant, respectively, which, not having been disturbed by superior authority on appeal, he contended, was final, and not liable to be questioned by any suit in the Civil Courts.

We were clearly of opinion that this contention could not be sustained. There is nothing in the terms of Act I of 1847 which either gives finality to the order made by the Collector under the Act, or enables him to go into questions of disputed title, or to do any thing more than demarcate by visible and tangible marks the boundaries between estates or fields.

In this state of the case, the question arose whether we could proceed to determine the case as it stood, or ought to remand it to the Court below in order that the evidence which the parties might desire to produce should be heard.

I think we are bound to order a remand.

* * * *

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Considering that in the previous hearing of these cases before this Court the appellants had got their costs, it seems to us right that the present appellants should also get the costs of this hearing.

* * * *

Macpherson, J.—I concur in the proposed order of remand.

The 28th June 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Butwarrah—Regulation XIX of 1814—Joint occupation.

Application for Review of Judgment passed by the Hon'ble Justices G. Loch and W. Ainslie, on the 2nd March 1871, *in Special Appeal No.* 1875 *of* 1870.*

Shaikh Bundey Hossein, Plaintiff (Respondent) *Petitioner,*

versus

Lalla Puriag Dutt and another, Defendant (Appellant) *Opposite Party.*

* 14 W. R., P. C., p. 11.

* 15 W. R., p. 225.

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Moonshee Mahomed Yusoof for Petitioner.

No one for Opposite Party.

Where a Butwarrah is effected under Regulation XIX of 1814, the fact that certain bits of land, either through omission, neglect, or for convenience, have in making the partition been left in joint occupation does not give the proprietor of one estate any interest in the other, even in the case of a family place of worship.

Loch, J.—We are asked to admit a review of our judgment of the 2nd March last on the ground that it is opposed to the principles of the Mahomedan Law of pre-emption by which this case should have been decided.

The question was very fully considered when the case was before us on the previous occasion, and the present application is in fact a repetition of much of the argument then used, with further quotation from the Hedaya and Fattavi.

Moonshee Mahomed Yusoof, the pleader for the petitioner, has put the Mahomedan Law on the subject very fully and clearly before us; and had the partition which was made of this property taken place under the Mahomedan Law, the parties knowing that that Law would govern the partition, and one of them being a Mahomedan, it may be presumed that such would have been the case had it been a private partition, I should have hesitated to say that the plaintiff in this case had not a right of pre-emption. But the partition in this case was not made by private parties acting in concert and under the rules and sanction of the Mahomedan Law, but it was made under the provisions of the Butwarrah Law, Regulation XIX of 1814, by or under the superintendence of the Collector of the district, and the object and effect of a partition under that law is entirely to put an end to all community of interest between parties who were formerly co-partners and to make out of one joint estate two entirely separate and independent estates, bearing separate jummas and in all respects unconnected with each other. The fact that certain bits of land either through omission, neglect, or for convenience, have, in making the partition, been left in joint occupation does not give the proprietor of the one estate any interest in the other. If, as the law makes him, he is not a partner, he cannot be considered such by reason of participation in some plots of ground which have not been properly divided. Section 11, Regulation XIX of 1814, has been referred to by the pleader as showing how certain property even when there has been a partition may still be held jointly. No doubt it does so. The Section relates to family place of worship which, for the convenience of parties and from the impossibility of dividing them without causing irreparable loss and annoyance to the parties, the law permits to be held jointly; but the interest of each party is entirely separate and the position of the parties in respect to the property thus held jointly is rather that of vicinage than of partnership. Under this view of the case, I think the application must be rejected.

Ainslie, J.—I concur in rejecting this application. The pleader for the applicant says that the Mahomedan Law only looks to the facts existing at the time of sale and takes no notice of the intentions of parties previous to a partition. But the Butwarah law clearly recognizes and is founded on such intentions, and if we admitted the claim now put forward we should allow the Regulations of the British Government in India to be over-ridden by the Mahomedan Law, and that in a case wherein the right claimed (that of pre-emption) is of the feeblest description and the defendants are Hindoos.

The 28th June 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Tenancy—Transfer—Forfeiture.

Case No. 386 of 1871.

Special Appeal from a decision passed by the second Subordinate Judge of 24-Pergunnahs, dated the 31st December 1870, affirming a decision of the Moonsiff of that District, dated the 24th February 1870.

Dwarkanath Misree (Plaintiff) *Appellant,*

versus

Kanaye Sirdar (one of the Defendants) *Respondent.*

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Baboos Ashcotosh Dhur and *Chunder Madhub Ghose* for Appellant.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondent.

A tenant who alienates his tenure does not thereby subject it to forfeiture.

Ainslie, J.—In this case, the plaintiff, as putneedar, sues to recover certain land held by his tenant Kureem Mundul, on the ground that the tenant sold his interest to the defendant Kanaye Sirdar on the 11th Kartick 1269, and that by so alienating his tenure he has subjected it to forfeiture.

There appears to be no authority for saying that such an alienation effects forfeiture. On the contrary, there is a case in the 11th Weekly Reporter, page 94, which is directly against such a a contention. A case has, however, been cited by the pleader for the plaintiff, special appellant, from the Sudder decisions of 1855, page 14; but that was a suit by a purchaser from the tenant against the zemindar, and it may very well be that that suit was properly dismissed. The other is a case quoted from the 11th Weekly Reporter, page 162, in which it appears that a Division Bench allowed the remedy sought by the zemindar. They say—"We think it "has been decided conclusively by the Full "Bench Ruling reported at page 528 of the "7th Volume of the Weekly Reporter, "which is exactly in point as to the facts of "this case, that a mere right of occupancy "derived from a person who had only a "right of occupancy, and who on that "ground only asserted a right of transfer, "gives no title to the transferee against "the zemindar." Now, we do not wish to question the proposition of law laid down in that case; but it does not follow from the transferee's not being able to enforcehis rights to compel the zemindar to acknowledge him as his tenant, that therefore the original tenure has been forfeited. Therefore, in the absence of any authority, we think that the plaintiff's case for khas possession of the land must fail.

The special appeal is dismissed with costs.

The 29th June 1871.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Judgment inter partes—Evidence—Special Appeal—Review.

Case No. 12 of 1871.

*Application for review of Judgment passed by the Hon'ble Justices G. Loch and H. V. Bayley on the 12th February 1870, in Special Appeal No. 893 of 1869.**

Bhyrub Nath Toee and another (two of the Plaintiffs) *Petitioners,*

versus

Kally Chunder Chowdhry and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Petitioners.

Baboos Unnoda Pershad Banerjee, Omurendro Nath Chatterjee and *Issur Chunder Chuckerbutty* for Opposite Party.

A judgment *inter partes* may be received in favor of a stranger as against a party thereto, not as concluding such party, but as evidence for what it is worth.

The High Court has no authority to admit a review of a judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered.

Loch, J.—We are asked to admit a review of our judgment of 12th February 1870, by which the finding of the Lower Appellate Court to the effect that one Benee Chunder had not been adopted as the son of Huree Koomar was confirmed, on the ground that by a judgment of the Privy Council of the 8th December 1870,† to which Sheeb Chunder Bhadoory, one of the defendants in the present suit, was a party, the adoption of Benee Chunder had been declared to be a good and valid adoption.

The application for review came on for hearing in the presence of all the parties this day.

The history of this litigation briefly stated is as follows:—The plaintiffs, Bhyrub Nath Toee and Govind Chunder Toee, claim the property in dispute as the legal heirs of Benee Chunder, the adopted son of Huree Koomar, and seek to recover possession from the hands of the defendant Kally

* 13 W. R., p. 168.

† 15 W. R., P. C., p. 12.

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Chunder Chowdhry, who alleges that he purchased it from one Gudadhur. The defendant Kally Chunder admitted the adoption of Benee Chunder, but contended that Gudadhur was nearer of kin to Benee Chunder and Huree Koomar than the plaintiffs, and his title was consequently preferable to the plaintiffs.

Another suit was instituted about the same time as the present in which Sheeb Chunder Bhadoory sued to recover part of the property comprised in the present suit from Kally Chunder Chowdhry, on the allegation that he had purchased the property from Gudadhur, the legal heir of Huree Koomar, on a date prior to the purchase made by Kally Chunder; that Benee Chunder was never adopted and that Kally Chunder's title was not valid. In that case, Kally Chunder admitted the adoption of Benee Chunder and pleaded that he had purchased from Gudadhur who had succeeded to the property after the death of Benee Chunder as his next heir at law. The result of that case was a finding in favor of the adoption by the first Court and dismissal of Sheeb Chunder's suit, but on appeal the judgment of the first Court was set aside and the adoption was declared invalid, and a decree was given in favor of Sheeb Chunder; and this judgment being affirmed in special appeal (II Weekly Reporter, page 281) on argument based on alleged errors in law, a further appeal was made to the Privy Council and their Lordships going into the *facts* held on 8th December 1870* that the adoption of Benee Chunder was good and valid, and they made a decree setting aside the decree of the Lower Appellate Court and restoring that of the first Court. The effect of that judgment, therefore, is to declare the adoption of Benee Chunder valid and the sale to Sheeb Chunder by Gudadhur invalid, so that his claim to any part of this property under his purchase is null and void, it having been made at a time when Benee Chunder was alive and Gudadhur was not in possession of the property.

The Subordinate Judge, who tried the case of Sheeb Chunder referred to above, at the same time tried the present case in which Bhyrub Nath Toee was plaintiff, and having found the adoption of Benee Chunder invalid in the other case, he dismissed this suit as Bhyrub Nath claimed through the adopted son. On appeal to the High Court the case was on 20th February 1867, remanded to be tried independently of the other case, after considering the evidence recorded by the parties in this case and not with reference to a judgment passed in another case to which the plaintiff was not a party.

It appears that the first Court, considering Sheeb Chunder to be a party interested in this suit, directed him to be made a defendant. He at once set up his own title through Gudadhur as preferable to that of the plaintiffs, denied the adoption of Benee Chunder through whom the plaintiffs claimed, and whose adoption was admitted in this case by his co-defendant, Kally Chunder Chowdhry, and put the question of adoption in issue. Evidence was taken and the Lower Appellate Court on 29th December 1868, setting aside the judgment of the Subordinate Judge, held the adoption to be invalid and dismissed the suit without entering into the question at issue between the plaintiff and Kally Chunder Chowdhry, and his judgment was affirmed on special appeal by the High Court on 12th February 1870.*

The plaintiff, Bhyrub Nath Toee, on the strength of the Privy Council judgment of 8th December 1870, to which, however, he was not a party, prays the Court to admit a review and to have the case sent back for trial of the issues which arise between him and Kally Chunder Chowdhry in whose appeal the judgment of the Privy Council was passed. Both Kally Chunder Chowdhry and Sheeb Chunder Bhadoory oppose the application, and certainly the opposition comes with a bad grace from Kally Chunder who has all along admitted the adoption of Benee Chunder and holds in his hand the judgment of the Privy Council obtained on his appeal against Sheeb Chunder, by which the adoption of Benee Chunder which was the back bone of his appeal has been declared good and valid. The objection to the admission of the judgment of the Privy Council in this case is that Bhyrub Nath was not a party to that judgment; he cannot therefore make use of it against Sheeb Chunder in this case; that though the judgment be a binding decision as between Sheeb Chunder and Kally Chunder, it does not preclude Sheeb Chunder from again pleading the invalidity of the adoption and producing other evidence in support of his allegation; that the evidence in the present case is complete in itself and is different from that given in the other case, and therefore any judgment passed upon evidence

* 15 W. R., P. C., p. 12.

* 13 W. R., p. 168.

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recorded in that case cannot be admitted either as concluding the defendant in this case or as evidence against him. We do not think the judgment of the Privy Council can be considered as an estoppel, though it might have been used by the plaintiff, had it been in existence at the time this suit was brought, as a piece of evidence liable to be rebutted by any other and better evidence which the defendant might be able to give in this case. Taylor, in his work on Evidence, Section 1495, says :—"Judgments "*inter partes* are not, with one exception, "admissible either for or against strangers "in proof of the facts adjudicated. They "are not admissible against them because "it is an obvious principle of justice that "no man ought to be bound by proceedings "to which he was a stranger and over the "conduct of which he could therefore have "exercised no controul * * * * "and they cannot be received in their "favour *even as against a party thereto*, "because it is thought *with very question-* "*able propriety* that the previous rule might "work injustice unless its operation were "*mutual*." The strictness of this rule has, however, not unfrequently been relaxed in this country, and it has been held that a judgment may be received in favour of a stranger as against a party thereto not as concluding such party but as evidence for what it is worth, and in this way and to this extent the plaintiff in this case might have made use of the judgment of the Privy Council, had it been in existence when this case was under trial.

The difficulty we feel in this case is whether we can, as a Court sitting in special appeal, admit evidence to prove a fact which evidence was not before the Lower Court. As a Court of special appeal, our duty is to determine whether there is any thing contrary to some law or usage having the force of law in the judgment of the Lower Appellate Court, or that there is in it some substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground ; and the conclusion we come to must be formed on the record as it stood when the case was before the Lower Appellate Court whose decision on facts cannot be questioned except as provided for by the law to which reference has just been made. Now, we are satisfied that our judgment in this case when it was before us as a special appeal was a proper order, for we found no grounds arising from any defect of law in the judgment of the lower Court to interfere with it, and we rejected an application for a review of the judgment we then passed, which was made to us on 8th August 1870. We could not go into the facts in special appeal, which Her Majesty's Privy Council has done. Moreover, had not this judgment of the Privy Council in the case of Kally Chunder and Sheeb Chunder been produced, we should have had no ground for entertaining this application for a review of our judgment. Nor, if we were sitting in special appeal and hearing the case for the first time, could we admit evidence which had not been filed in the Court below. Perhaps we might permit the special appeal to be withdrawn with permission to the party to present an application for review to the lower Court, but without some such permission on our part the lower Court would be unable to admit a review, as these are only admissible if no special appeal has been admitted by the High Court. In the present case, however, the special appeal has not only been admitted but heard and determined more than a year ago, and an application for review of our judgment has been already rejected. Under such circumstances, there does not appear any mode by which the present application can be complied with or the plaintiff's case be brought up for re-hearing before any of the Courts in this country. If it is not within the power of this Court sitting in special appeal to admit evidence to prove a fact which has not been and could not have been placed before the lower Courts, and we believe that we have not authority to admit such evidence, and if from the circumstance that a special appeal has been admitted (and in this case heard and disposed of) no application for review can be made either to the first Court or to the Lower Appellate Court, then a party who has discovered new evidence after a special appeal has been admitted is apparently without remedy. Whether a review can be admitted by the lower Court after a special appeal has been admitted in the High Court is, however, a question we are not now required to determine. The point appears to have been before a Full Bench of the High Court in the case of Bharut Chunder Mozoomdar, V Weekly Reporter, page 69, but no decision appears to have been come to as the point was found not to arise on the facts in that case. Under any circumstances, it appears to us that

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this Court cannot admit a review of a judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered, and under this view of the law we think this application should be rejected with costs.

The 29th June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Hindoo law—Childless wife—Heirs—"Nuptial fire"—Construction.

Case No. 234 of 1871.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 17*th January* 1871, *affirming a decision of the Moonsiff of that District, dated the* 14*th September* 1870.

Bistoo Pershad Burral (Defendant) *Appellant,*

versus

Radha Soonder Nath (Plaintiff) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboos Sreenath Doss and *Nuleet Chunder Sein* for Respondent.

If a Hindoo wife dies childless, all property given to her by her father at the marriage ("before the nuptial fire") goes to the husband.

"Given before the nuptial fire" is only a term to signify all gifts during the continuance of the marriage ceremonies.

Ainslie, J.—THE suit has been brought by a husband against his deceased wife's father to recover from him certain ornaments specified in two schedules respectively marked ক and খ which may be conveniently called Nos. 1 and 2. No. 1 is a list of articles given to the bride by her own father before the nuptial fire, and No. 2 a list of articles given by the husband's father on the following day.

The defendant averred that the former had been given before the marriage and the latter some days after it.

The first Court held that the former had been given, as alleged by the plaintiff, before the nuptial fire and that the latter were given before the bride was taken from her father's house, and made a decree in favor of the plaintiff citing certain passages of the Dayabhaga which are to be found in verses 4 and 5 of Section 1, Chapter IV, and verse 2, Section 3 of the same Chapter.

This decree was affirmed by the Judge. In special appeal, it is contended that the effect of the finding of the first Court is to bring the articles in list No. 2 within the class of "gifts subsequent" or of "fee or perquisite," both of which go to the brother in default of issue, and that the articles in list No. 1 also properly go to the brother.

In respect of the articles in list No. 1, there can be no doubt whatever. The marriage was in the Brahma form, and by verse 2 as explained by verse 4 of Section 3, Chapter IV of the Dayabhaga, the property acquired by the wife at the marriage goes to the husband. Verses 10 to 14 would seem to extend the brother's rights to all property of a childless woman, but verses 9 and 15 clearly show that these intermediate verses are to be read with an exception of the property specially provided for in verses 2 and 6.

Then as to the property in list No. 2. The Moonsiff has found distinctly that these articles were given *before* the bride was taken from her father's house. He seems indeed to treat these as gifts in the bridal procession, but the Judge who has adopted the facts as found by the Moonsiff has more correctly described them as gifts to the bride at her marriage, which was not concluded at the time of presentation, as the *Basee Bibâho* is, we understand, a part of the marriage ceremonies among persons of the class of the parties to this suit. It has been contended that the gifts which rank as "Yautuka" are those given before the nuptial fire only, that is, while the fire is maintained; but in the Daya Krama Sangraha, page 34, it is said the expression "before the nuptial fire" occurring in the text (of Katyayana) before cited and that "at the time of the nuptials" in the text (of Vyasa) are both illustrative. The text of Katyayana is "what is given to women *at the time of their marriage*, near the nuptial fire, is celebrated by the wise as the women's peculiar property bestowed before the nuptial fire." So that the restriction contended for cannot be maintained. "Given before the nuptial fire" is only a term to signify all gifts during the continuance of the marriage ceremonies.

The appeal must therefore be dismissed with costs.

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The 30th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—Wuqf—Mutwullee—Shiah—Soonee.

Case No. 2255 of 1870.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 19th July 1870, affirming a decision of the Second Subordinate Judge of that District, dated the 19th March 1870.

Doyal Chund Mullick (one of the Defendants) *Appellant,*

versus

Syud Keramut Ali and another (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Bykunt Nath Paul* for Appellant.

Mr. R. E. Twidale and *Baboo Sham Lall Mitter* for Respondents.

In the case of Wuqf land, the mere stoppage of religious services does not start limitation.

The chief elements of Wuqf are special words declaratory of the appropriation and a proper motive cause: and where the declaration is made in a solemnly published document, the Wupf is completed.

A valid Wuqf cannot be affected by revocation or by the bad conduct of those responsible for the carrying out of the appropriator's behests, nor can it be alienated.

The fact of a person being a Shiah does not disqualify him for the supervision of a Wuqf made by a Soonee.

Glover, J.—THIS was a suit by the Mutwullee of the Hooghly Emambarah, acting on behalf of the entire Mahomedan community of that and neighbouring towns, to have it declared that certain lands specified in the plaint were "Wuqf" and therefore not alienable; and also to have declared null and void a sale of those lands by the defendants Gholam Surwar and Omda Bibee to the defendant Doyal Chund Mullick. The plaintiff asked that these lands should be restored to the endowment, together with such mesne profits as had accrued from the date of the illegal sale.

The defendant Golam Surwar replied that his father had before he died revoked the gift made under the "Wuseeutnamah," and that consequently the property was no longer "Wuqf" but heritable; that he and Omda Bibee inherited it and sold it, as they had a perfect right to do, to the defendant Doyal Chund Mullick.

This last defendant added that the plaintiff had no *locus standi*, and had no right to bring the suit.

At the original hearing, the Judge decided the case on this preliminary objection reversing the order of the Court below. He held that the Mutwullee of the Hooghly Emambarah had an interest in seeing that the object of the endowment was fulfilled and was therefore competent to bring the suit. He, therefore, remanded the case for trial on the merits.

The defendant appealed to this Court, but his appeal was dismissed. I may mention here, having been one of the Judges who decided the appeal, that we appear to have been mistaken as regards the nature of the endowment, which does not seem to me to have had any connection with Act XX of 1863; but this mistake did not influence the decision, which was conclusive as to the plaintiff's right to bring the present suit.

On the remand, the Subordinate Judge held that the disputed property had been made "Wuqf" for religious and other purposes by Mahomed Daem and that the defendants Gholam Surwur and Omda Bibee had no power to alienate it.

And the Additional Judge, on appeal, confirmed the decision of the Court below.

The purchaser defendant, Doyal Chund Mullick, appeals specially and contends:—

(1). That the plaintiff's suit was barred by limitation, he not having shown that the religious services had been carried on regularly since the date of the alleged endowment in 1251, B. S.

(2). That the "Wuqf" was never completed, and was therefore not a binding endowment.

(3). That the Wuseeutnamah merely created a trust on the property and did not prevent that property being sold burthened with the trust.

(4). That there is no evidence of the proceeds having been appropriated to the purposes enjoined in the deed. The property was used as ordinary family property, and therefore an innocent purchaser for value cannot be ousted.

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(5). That the so-called "Wuqf" only gave a certain portion of the profits for religious purposes; the remainder might be the object of a sale. And

Lastly.—That in any case, plaintiff cannot get a decree for possession and wassilat; the only thing he would be entitled to would be an injunction against the Mutwullees, ordering them to carry out the provisions of the endowment.

The first objection is untenable. It has been found as a fact by the Lower Appellate Court that religious services have been carried on on the endowed property within the limitation period, but in any case, if the land be proved to be "Wuqf," the mere stoppage of religious services would not start limitation. The plaintiff's cause of action arose when the defendants Nos. 1 and 2 sold the land to the defendant No. 3.

To dispose of the other objections, we must first see what was the nature of the arrangement made by Mahomed Daem: was it an endowment as "Wuqf," or a mere assignment of his property to his son and son-in-law burthened with certain trusts.

The deed is styled a "Wuseeutnamah" and bears date the 21st Aghun 1251, B. S. It was registered by Mahomed Daem himself on the 7th December 1844, almost immediately after its execution; that is

It recites that he, Mahomed Daem, has purchased a piece of land in the Karbullah of Hooghly (the land now in dispute) planted trees thereon and given it as "Wuqf" to God. The grantor goes on to say that he had a particular desire to build a small mosque upon the land, but had been prevented hitherto by the fact of his already having a mosque to keep up in Calcutta and that the double expense would be more than he could afford; that the Calcutta mosque was old and in bad repair, and that he intended to take advantage of its tumbling down, by selling the land on which it stood and applying the proceeds to building the new mosque on the "Wuqf" land. Should there be any balance, Mahomed Daem declares his intention of making it into a fund for charitable purposes according to a schedule annexed to the "Wuseeutnamah."

He adds that he had set apart the profits of all his other property, which included a garden and brick-built houses, for the charitable expenses mentioned in a schedule, and has appointed his son Gholam Surwar and his son-in-law Gholam Nubee Mutwullees, and has put them in possession.

He gives further directions regarding the old mosque in Calcutta, desiring the Mutwullees in the event of the building falling down after his, Mahomed Daem's, death, to build a small mosque on the "Wuqf" land and to apply the balance to the charitable purposes above mentioned.

Mahomed Daem finishes the "Wuseeutnamah" by desiring that on his death his son and son-in-law will appropriate his goods and chattels to the performance of the religious and charitable purposes above mentioned, and to the maintenance of his widow and two female slaves; the balance they are to share between them, and certain arrangements into which it is not necessary to enter are made with reference to those shares.

The endowment ends with a solemn injunction against selling or giving away any part of the property and with an appeal to the Mahomedan community to interfere "in the name of God" if they saw the endowment improperly applied, or the grantor's directions not carried out.

It is argued for the special appellant that Mahomed Daem himself styles this deed a "Wuseeutnamah" or will, and that it wants many of the elements of "Wuqf;" for instance, all the proceeds were not to be appropriated to religious and charitable purposes, whereas a real "Wuqf" allows of no exception; that the building of a mosque on the land was a condition precedent to the lands becoming "Wuqf," and that whatever name the deed may be called by, Mahomed Daem before his death revoked his gift and took the property into his own hands.

Now, in the first place, it must be remembered that the deed professes to deal with all the property then in Daem Mahomed's possession, and not only with the plot of land in the Karbullah of Hooghly, which that person bought and planted with trees for a particular purpose. There might possibly be some question as to whether all the arrangements made by Mahomed Daem in the "Wuseeutnamah" came under the denomination of "Wuqf," using the word in its restricted sense, as something appropriated to works of religion and charity. But we have not to do in this case with the general appropriation made or said to have been made by Mahomed Daem, but with the appropriation of the particular garden, 13 beegahs

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4½ cottahs in extent, which the plaintiff seeks to recover. With reference to this plot of land, Mahomed Daem says in the Wuseeutnamah,—"I have purchased a piece "of land in the Karbullah of the town of "Hooghly, and with the intention of sweeping "the consecrated ground as a fukeer, have "planted a garden thereon, and made it "Wuqf to Almighty God."

The chief elements of "Wuqf" are according to Mahomedan Law (Baillie's Digest, 551) special words declaratory of the appropriation and a proper motive cause. Now in this case, the words of appropriation seem clear enough—"I have made it Wuqf to Almighty God,"—and the further condition that there should be a nearness, or some relation between the appropriator and the objects of the appropriation appears to be fully carried out, for the setting apart of a piece of land for the ultimate site of a mosque and for the present use of Mahomedans as a place of meeting on the great festivals of their religion where the Koran might be read and charitable doles made, would be a proper object of Mahomedan faith and therefore a proper object of "Wuqf." It would be, as defined in the 3rd Volume, Hedayah, page 895, "a seeking for nearness," and the legal effect would be an abatement of the appropriator's right of property in the thing appropriated.

The "Wuqf" so far as the garden now in suit is concerned was completed when Mahomed Daem declared in a solemnly published document, that he had given that garden as "Wuqf" to Almighty God. It was contended by the special appellant's pleader that the erection of a mosque on the land was a condition precedent to the perfection of the endowment, but a glance at the Wuseeutnamah shows that it is not so. Mahomed Daem states his intention, in the event of the old mosque in Calcutta tumbling down, of selling the land on which it had been built and of applying the proceeds to the building of a new mosque, and (if the funds were sufficient) to the payment of certain religious and charitable expenses mentioned in a schedule attached to the deed; but he clearly anticipates that the old mosque may out-last him and gives directions to his Mutwullees to build the mosque and defray the expenses whenever the falling down of the old building left them at liberty to sell the land.

So far as we can see, the appropriation of this garden plot as "Wuqf" was fully and properly made by Mahomed Daem, and the difficulty in the case has arisen, we think, from not properly distinguishing between the various properties left by Mahomed Daem. It may be that so far as regards the bulk of his property (described as garden paying rent and brick-built dwelling houses) the Wuseeutnamah would merely burthen the heritage with certain trusts; but we have nothing to do with these properties in the present case. We have only to see whether the 13 beegahs of land in the Hooghly Karbella was appropriated by Mahomed Daem as "Wuqf." The Judge below has found that it was so, and for the reasons above given I think he was right.

A good deal was attempted to be made of the fact that the Mutwullees had not carried out the intentions of the appropriator and that Mahomed Daem himself had in consequence revoked his gift. This argument begs the whole question, for if the appropriation as "Wuqf" were valid in the first instance, no revocation could affect it. If Mahomed Daem made the garden "Wuqf," "Wuqf" it must remain; and no bad conduct on the part of those who were responsible for the proper carrying out of the appropriator's behests, could make the gift more or less a "Wuqf." There was a special proviso in the Wuseeutnamah that the "Wuqf" garden was never to be alienated, but without that provision, alienation would have been prohibited by the express terms of Mahomedan Law.

This "Wuqf" garden could not legally be sold; and the defendants 1 and 2 therefore could pass no title to the purchaser defendant No. 3.

The question then arises—who is to take charge of the property? It is clear that Gholam Surwar is not a proper person to continue to superintend it. In such cases, the Mahomedan Law empowers the Judge to take the "Wuqf" out of the hands of an untrustworthy Mutwullee and appoint another superintendent. In this case, the Judge has appointed the plaintiff, and the appointment seems under the circumstances the most proper one that can be made. The plaintiff is the leading Mahomedan of Hooghly and a man of considerable influence and importance for many miles round. True, he is a Shiah and the appropriator Mahomed Daem was a Soonee; still, that would not affect the proper supervision of the objects for which the "Wuqf" was made.

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With regard to mesne profits, there appears to be no reason why the "Wuqf" should not benefit by them.

On the whole, we think that we ought not to interfere with the decision of the Courts below. The appeal is dismissed with costs.

The 30th June 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Section 246, Civil Procedure Code—Mortgage—Decree—Money-decree—Execution—Rule of construction.

Case No. 204 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th July 1870.

Maharajah Dheraj Mahtab Chand Bahadoor (Plaintiff) *Appellant,*

versus

Hurdeo Narain Sahoo and others (Defendants) *Respondents.*

Mr. C. Piffard and *Baboo Juggadanund Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboos Mohinee Mohun Roy* and *Debendro Narain Bose* for Respondents.

The only question proper to be decided under Section 246 Act VIII of 1859 is whether the property attached is in the possession of the judgment-debtor or some person in trust for him, or whether it is in the possession of a third party not in trust for the judgment-debtor.

A money-decree cannot be executed against a judgment-debtor's property after such property has passed by purchase into the possession of a third person, without such third person being made a party to a suit to enforce the supposed lien.

All that can be sold under a money-decree, is the judgment-debtor's right title and interest.

If a particular construction of a part of a document renders a contract evidenced by it inoperative, and another construction renders it operative and is reconcilable with other portions of the document, the first should give way to the second.

Paul, J.—THE title which the plaintiff asserts in this suit and which he desires to establish by a decree of this Court arises as follows:—

That the property in dispute which is a lower-roomed-tiled house or bungalow *within the walls* of the fort of Monghyr, belonged originally to certain trustees; that in 1857 the East India Railway Company contracted with those trustees for the purchase of this house; that in 1863 the East India Railway Company without having obtained a conveyance, but probably having paid for the purchase, sold the same house to Mr. Fitzpatrick, an indigo planter, residing at a (two-storied) house called *Lall Durwaza within the fort,* though *out of the line of the walls* and moat of Monghyr; that out of rupees 6,000 the amount of consideration, rupees 5,000 was paid down by Mr. Fitzpatrick to the Railway Company, and that possession was given by the Railway Company to Mr. Fitzpatrick; that on the 6th September 1867 Mr. Fitzpatrick by a Persian kobalah conveyed the house in question to the Maharajah of Burdwan for the consideration therein mentioned; and in further performance of the contract of purchase and sale between Mr. Fitzpatrick and the Maharajah of Burdwan, a conveyance was executed by the East India Railway Company at the request of Mr. Fitzpatrick and by Mr. Fitzpatrick himself to the Maharajah of Burdwan and which is an English conveyance dated the 2nd February 1869. These facts, which are undisputed, shew that the Rajah acquired apparently a good and valid title in the house in dispute. It further appears that *before* the last conveyance was executed, but *after* the execution of the Persian conveyance in favor of the Maharajah of Burdwan and in the month of November 1868, the house in dispute was attached in execution of a decree obtained by the defendant Baboo Hurdeo Narain Sahoo against Mr. Fitzpatrick on the 24th June 1867. The Maharajah put in two applications contesting the legality of that attachment. The *first,* he based upon his possession under the Persian kobalah, and the second,—upon the first being dismissed,—upon his possession under the English bill of sale. The two orders dismissing his applications are dated the 6th February and the 27th November 1869. It further appears that in order to stay the sale of the property so attached, the Maharajah offered by a petition to pay in the amount of the decree, about rupees 5,000, under protest, reserving to himself the right to dispute such payment and to recover it back by a regular suit. The order which the Subordinate Judge pronounced upon his application was

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that he would not allow the money to be paid into Court conditionally, but that if it was intended to save the property from sale the money should be put in unconditionally. Having no alternative left, the Maharajah was obliged to pay in the money unconditionally. The Judge before whom the money was so paid, holds in his judgment now under appeal that the money so paid in must be taken to have been paid under compulsion. It is not necessary in the view that we take of this case to decide definitively as to whether the money was paid in under compulsion. It will only be sufficient to advert to this circumstance in answer to an argument raised by the defendant to be noticed hereafter. In consequence of the two orders of the 6th February and the 26th November 1869 having caused either a disturbance of the Maharajah's possession or having thrown a cloud over his title, he brings this present suit to have his title established and his possession quieted, and to set aside these last mentioned two orders.

It appears to us that the two orders of the 6th February and the 26th November 1869 are wrong on their face, because they adjudicate upon the respective titles of the defendant, Baboo Hurdeo Narain, and the plaintiff, the Maharajah of Burdwan, and do not adjudicate upon the only question which is proper to be decided under Section 246, as to whether the property attached was in the possession of the judgment-debtor, or of some person in trust for him, or whether it was in the possession of a third party, *viz.*, the appellant before us, the Maharajah, held by him for himself, and not in trust for the judgment-debtor. Instead of deciding upon matters so plainly stated in Section 246, the Judge adjudicates the question of title which comes properly within the functions of a Judge in a regular suit, as has arisen in this present case. Thus, for these reasons, independently of other reasons which will presently be assigned to show that the Rajah is entitled to succeed in this case and to have those obnoxious orders set aside, we think it is clear that we should hold that the two orders should be set aside.

Now, the title on which the plaintiff, the Maharajah, bases his case is resisted by the defendant on the following title. The defendant admits that the property in suit became vested in Mr. Fitzpatrick in the year 1863, in the way in which the plaintiff alleges that it did so become vested, but he goes on to allege that in the year 1864, Mr. Fitzpatrick, by a bond of the 13th April 1864, hypothecated this very property, *viz.*, the *lower-roomed house within the walls of the Fort* of Monghyr, together with other property for the payment of rupees 7,000 then or previously thereto lent by him to Mr. Fitzpatrick. He further says that in the beginning of the year 1867, he instituted a suit against Mr. Fitzpatrick to realize the money so lent or advanced by the sale of the house in question; that he obtained the decree he prayed for in his plaint, *viz.*, a decree entitling him to sell the house in this suit, by a confession of judgment then made by Mr. Fitzpatrick; that he took out execution in November 1868 whereby he attached this house; and that as his bond of hypothecation and his decree for realizing the amount of the bond out of the property hypothecated, were both anterior to the purchase by the Maharajah of Burdwan of the house, he is entitled to have his execution enforced notwithstanding the subsequent purchase by the Maharajah of Burdwan.

These allegations, if true, might have created considerable difficulties in the way of the Maharajah claiming to establish his right in this suit, but these allegations so pertinaciously put forward are more or less incorrect in fact. To take up his decree first and the bond of hypothecation next in order to examine the pretensions which the defendant has put forward in regard to the present house. The suit which was instituted by the defendant to realize the amount of his bond dated the 13th April 1864, was based on a plaint in which he first of all stated the fact of the borrowing of the money by Mr. Fitzpatrick and the giving of the bond. He next recited the contents of that bond, and the recital was that by that bond Mr. Fitzpatrick had hypothecated or mortgaged *the two-storied house at Lall Durwaza;* that the money covered by the bond remained unsatisfied; and that consequently he was entitled to pray and did pray that by sale of that two-storied house at the Lall Durwaza of the Monghyr fort the debt due to him be realized. Mr. Fitzpatrick appeared in that suit and confessed judgment which it would appear was confirmed by a deposition of his either taken in that or some other suit. The solehnamah which was agreed to between the parties was to the effect that the plaintiff (*viz.*, the present defendant) should receive the amount of his bond-debt from Mr. Fitzpatrick, and Mr. Fitzpatrick should pay him the same in three instalments, and that

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until the instalments should be satisfied, the two-storied house at Lall Durwaza should remain subject to the decree and should not be available in the hands of Mr. Fitzpatrick for the purposes of sale or mortgage or otherwise. The terms of the decree founded on the above solehnamah are no doubt somewhat ambiguous, but when read with the plaint and the solehnamah, no doubt remains that the decree must be taken as carrying out the prayer of the plaint and the terms of the solehnamah. To consider the decree however in both ways, it will be shown that it is quite immaterial in which of two ways the decree is read. The other construction which it was suggested might be put upon the decree was that it was a money-decree and that under that decree *any* property of Mr. Fitzpatrick whether *mortgaged* or *not mortgaged* was liable in execution. Now, having regard to the true construction of the decree as I have first stated, it is clear that the decree in a suit which was for the realization of the mortgage debt by the sale of the two-storied house at Lall Durwaza, cannot be carried into execution by attachment of a property which was neither the subject of that suit nor the subject of that decree, *viz.*, a one-storied house with bungalow in the walls of the Fort. Therefore, on that ground the execution of the decree must fail, and if the decree was founded on a mistake that mistake would have to be rectified before execution can be authorized. Upon that ground therefore, as well as on the other grounds which have already been mentioned, the order as to execution must be reversed.

Next, taking the decree to be a *money* decree, it is to be remarked that it was passed in June 1867. The execution was sought in November 1868 after the Maharajah of Burdwan had purchased the property in suit and obtained possession under the Persian kobalah. It is obvious under these circumstances that without making the Rajah a party to a suit purporting to have been brought to enforce the supposed lien of the decree, execution could not be had against this property in suit. Therefore, on this ground also the execution proceedings must fail and the order for execution must be reversed. And further, if the decree is to be regarded simply as a common money-decree without reference to the property hypothecated by the bond, all that would be sold under such a decree would be the right title and interest of the judgment-debtor, which at the time had ceased to exist and had become vested in the plaintiff. If execution of such a decree could be had, it would pass nothing. But the plaintiff desires to go further. He not only desires that these proceedings should be set aside but that litigation should be set at rest by a declaration of his rights. In order to see whether the clearly *primâ facie* title which the Maharajah had and has in him has in any way been interfered with or jeopardized or in any measure cut down by the dealings of Mr. Fitzpatrick with the defendant Hurdeo Narain, it is necessary now to look to the foundation of the title under which the defendant claims, *viz.*, the bond of the 13th April 1864. That bond recites as follows: —"I, William Fitzpatrick, a resident of "and proprietor of the Kootee Lall Durwaza, "izaradar of Dumdumma *alias* Rohimpore, "Pergunnah Brutpore, Zillah Monghyr, do "hereby declare that I am indebted to the "zemindars and kutkinadars for the rents "of the izara mehals." Then, in the seventh para. of the condition of the bond, it was stated as follows:— "If I now take more "mehals and if the Teepdaree and all its "conditions remain in force, then as long as "these rupees 7,000 of the Mahajun will "remain unpaid, *I shall not sell the kootee* "*inside the kellah, undur-i-kellah.* If I do, "then such deed of sale when produced be-"fore a Court of Justice shall be declared "null and void. On these conditions I execute "this ekrar that it may come to use in "future." Under this 7th condition, it is contended that the house in question being within the walls and the fosse of the fort, was intended to be hypothecated and was hypothecated, and not the two-storied house of Lall Durwaza which is *outside* the walls of the fort. It is contended, however, by the advocate for the Maharajah that that is not the true construction to be given to that para. of the bond.

Now in the first place, if we were to hold that some house *within the walls* of the fort of Monghyr was indicated as therein hypothecated, we should be compelled to say in the same breath that that hypothecation was bad for want of precision and on the ground of uncertainty and vagueness, considering that there are numbers of bungalows within the walls of the fort of Monghyr to which the description given would equally apply. In fact, if we were to adopt the defendant's construction of the document we should have to hold that no charge by

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way of hypothecation is made out, by reason of the indistinctness and vagueness of the above-mentioned condition of the bond. It is, however, a good rule of construction that if a particular construction of a part of a document renders a contract evidenced by it inoperative, and another construction thereof renders the contract operative and the construction to be put reconcileable with other portions of the document, the first should give way to the second. Now let us see whether or not, under the circumstances of this case, the first literal construction should give way to the second legitimate construction. Ordinarily speaking, in all conveyances, whether English, Persian or Bengalee, the subject of the conveyance and the purport of that conveyance are recited. In this particular case, if the construction given by the defendant be adopted, the subject of the conveyance must be taken to be no where recited in the document. It is, however, recited in the document that Mr. Fitzpatrick was the proprietor of the Lall Durwaza house and of certain izarah mehals, that he borrowed certain sums of money in respect of which he in the first instance hypothecates the rents of the ijarah mehals, and in the second place subject to certain contingencies which have been previously alluded to, the house *within the fort* is to be rendered available for the mortgage debt. Now apparently the house stated in the last condition would have reference back to the recital in the document unless such a construction is rendered wholly impossible. The impossibility of that reference is based upon the words "inside the fort." It would appear, however, that the words "inside the "fort" do not necessarily mean inside the *walls* of the fort. The Lall Durwaza house is situated within 25 cubits of the Lall Durwaza gate outside the walls of the fort of Monghyr, and it may very well be that although that house is not situated within the walls of the fort, which are not the words used in the document, it may nevertheless be said that it is situated inside the fort. We sent for the Government map of the Monghyr fort from the Surveyor General's Office and carefully inspected it. This map shows that the precincts of the fort extend *beyond* the Lall Durwaza, and that the locality indicated by a clump of trees 25 cubits off is within the fort in the same way as the trees standing on a part of the maidan of Calcutta may be said to be within the garrison of the fort of Calcutta. But this which is a sufficiently correct answer to the position put forward by the defendant is made as clear as it can be by the proceedings and acts of Hurdeo Narain himself. The first execution which he took under the decree of the 14th June 1867 was directed against the two-storied Lall Durwaza house, and when it was resisted by Dr. Duka he put in a petition to the effect that although in the document the house was mentioned as being "inside the fort," it was in fact the house which it was intended should be hypothecated, and that the same was near and within the precincts of the fort. He stated that the subject of contest was the Lall Durwaza and *not* any other house within the walls of the fort of Monghyr. It therefore appears that the construction which we put upon the words "inside the fort" as being inside the fort and its precincts, and not necessarily within the *walls* of the fort, is borne out by the defendant's own view of the matter, expressed on the occasion of Dr. Duka's opposition to the plaintiff's execution and by the plaint the defendant filed and the decree he obtained in that suit. We therefore consider that we are in every way fortified in the conclusion that we have come to.

It is further very ably argued by Mr. Piffard that even if we assume that the house in question was hypothecated, it was only a contingent hypothecation with reference to the terms of the 7th para. of the Teepdaree. It appears to us that Mr. Piffard's contention is correct. The whole of the 7th para. of the ekrar is governed by the word "if" in the opening of the sentence—"if I take more mehals," &c., &c., and as it is not shewn that that particular contingency had arisen, assuming there was a hypothecation in the event of that condition arising, the hypothecation fails.

For all these reasons, we hold that the preferential title of the Maharajah is fully made out, and that the defendant Hurdeo Narain has no title to the house, *firstly*, because it does not pass under his bond, and *secondly*, if it does, because the particular contingency contemplated in para. 7 of the Teepdaree is not shewn to have occurred.

We may add that the defendant having put forward considerable opposition to the claim of the plaintiff which compelled him to come into Court, and having, after the plaintiff had brought this suit, opposed his paying off of the money subject to objection in this very suit, it is extremely disingenuous on the part of the defendant now to contend

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that as the Rajah had paid the money unconditionally, he has no cause of action against him, the defendant. The course which the Subordinate Judge adopted has given rise to a second suit. The object of all litigation should be that the matters in dispute should be made to converge to a few clear points or issues to be comprehended if possible in one suit, but instead of that convergence we have here a clear divergence of all such matters giving rise to another suit to be brought by the Maharajah before he can obtain full relief. If the former of the two applications made on behalf of the Maharajah had been granted, the necessity to bring any further suit would not have arisen, but as it has been rejected the result (we cannot help remarking) will be that this present litigation will probably be followed by a fresh suit for the recovery of the money paid in by the Maharajah for the purpose of stopping the sale of his house. In this suit it is possible the Maharajah may run the risk of the objection that he paid in the money unconditionally being maintained so as to bar his cause of action.

We desire, however, to pass no opinion in this case on any point which is likely to affect the merits of any future litigation. We have been driven to make these remarks in answer to the arguments of the Counsel for the respondents. Now, inasmuch as the Maharajah has (as is stated) either already brought a suit for the recovery of the money paid in by him or intends to bring it, the present suit, and the declaration sought thereby must be regarded as a preliminary measure to his success in future litigation. and consequently the Maharajah is entitled to a declaration of his title to the house in dispute. Having held that the Maharajah is the owner of the house and the defendant has no title whatever to it, we shall make a declaration of title in the Maharajah's favor.

We had at one time some doubt whether or not under the circumstances of this case each party ought to pay his own costs, but after further consideration Mr. Justice Bayley and I think that the defendants ought to be made liable for the costs of this suit. It is quite clear that the conviction which the defendant had that the Lall Durwaza was the subject of the contract was a well-founded one, and the mere fact of his having been defeated in certain execution proceedings ought not to have induced him to oppose the plaintiff in this suit, as he had a well-founded cause of action which he might have enforced against Dr. Duka. We consider that he too willingly yielded to the view taken by the Court in execution, because he probably felt that he had a formidable party to contend with in Dr. Duka. We consider the defendant has not acted fairly, and consequently see no reason to exempt him from the general rule that the unsucessful party should pay the costs of the litigation. The decree will be as follows :—Set aside the two orders disallowing the plaintiff's claim, declare that the plaintiff is the owner of the one-storied house within the walls of the fort of Monghyr lately belonging to Mr. Fitzpatrick, and that the defendant has no right title or interest whatever in the same ; confirm the Maharajah's possession and order defendants to pay all the costs of this suit and the costs of the two proceedings hereby set aside.

Bayley, J.—I only wish to add a very few words in regard to the *costs.* I think the defendant ought to pay the costs of this litigation. The Court went against defendant's own idea of his own rights, and he has, but should not be allowed to have, taken advantage of that mistake—nor by that means have attempted to attach property under a vague definition of a house, when his own conduct was such that he must have known that he had no right to take any such advantage.

The 30th June 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Estoppel by conduct of parties (Pais) —Amendment of case.

Case No. 211 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 15th December 1870, affirming a decision of the Moonsiff of Sasseeram, dated the 6th July 1870.

Bhyro Dutt (Plaintiff) *Appellant,*

versus

Mussamut Lekhranee Kooer (Defendant) *Respondent.*

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Mr. R. E. Twidale and *Baboo Taruck Nath Dutt* for Appellant.

Baboo Rash Beharee Ghose for Respondent.

If the person who asks for redress is a party who has countenanced the acts of which he complains, the Court is bound to refuse him any redress or assistance.

A plaintiff can be allowed to amend his case only when he has an honest case, but either through mistake or some mis-apprehension he has not placed the real facts before the Court.

Paul, J.—In this case, the plaintiff, Bhyro Dutt, sued the defendant in a suit of a novel character,—for re-construction, as it is alleged, of a certain bund which the defendant had destroyed under color of a certain decree which he, as plaintiff, had obtained against the plaintiff's co-sharers.

The plaintiff alleged that the bund which was so cut or removed did not form the subject of that decree, but belonged to him exclusively having fallen in his share by a butwarah of the lands which was effected between him and his co-sharers, and that in consequence of the invasion of this clear right of the plaintiff he was entitled to have the bund restored.

The defendant answered that he had simply done what he was entitled to do under the decree which he had obtained.

The issue joined by the parties by reason of these conflicting statements was as follows: *viz*, whether the bund which had been cut belonged exclusively to the plaintiff and did not form the subject of the decree which the defendant had obtained.

The lower Court, in a very able and clear judgment, has come to a conclusion adversely to the plaintiff on both the points alleged by him—*firstly*, that no butwarah as pleaded by the plaintiff ever took place, and that therefore the property did not exclusively belong to him ; and *secondly*, that the defendant had cut or removed the bund which he was entitled to remove under the decree which he had obtained against the plaintiff's co-sharers. The conclusion as to the identity of the bund in this suit with the bund which was decreed to be cut in the suit brought by the defendant was fortified by a local enquiry conducted by an Ameen and tested by the Moonsiff (the first Court) personally on the spot, and it appears that the only bund which the plaintiff could point out as having been cut was the subject-matter of the decree which the defendant had obtained. The Lower Appellate Court, after going into a great many reasons some of which have afforded the special appellant's pleader the opportunity of criticising its judgment, has come to this finding :—"It is "further shewn by the course appellants "have taken in this appeal (independent of "the evidence recorded) that his suit is a "false suit, and that the bund and obstruction "that has been opposed is the obstruction "noted and decreed in the original suit."

The pleader who argued this special appeal would not, however, at once come to the point, *viz.*, whether the finding of the Lower Appellate Court as to the identity of the bund was or was not a proper finding in law.

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Mr. Twidale who followed him very candidly stated that as far as the question of identity went, the finding of the Lower Appellate Court was conclusive and could not be questioned in special appeal.

The whole force of the address of the pleader for the appellant who argued this case was directed to the point which, as previously observed, was not put in issue by the plaintiff and the defendant in the Courts below and did not arise on the merits with reference to the right determination of the case, *viz.*, that assuming that the bund in dispute was the subject-matter of the decree which the defendant had obtained, as he, the plaintiff, was no party to that decree, he had a right to re-open the whole case upon which the decree was founded. Now, in the first place, there is a finding of fact that the plaintiff had no share allotted to him by partition in which the bund, as alleged by him, fell—therefore it follows that he was a joint share-holder, and we are at a loss to find out, having regard to the fact that a decree was passed against the 10 annas share-holders for the cutting of the bund, how much of the decree the plaintiff

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could hope to resist? Was he to resist the demolition of a portion of the bund which was joint and undivided, for his position is apparently that and nothing else if there is any validity at all in the position that he has assumed? It is, however, clear that the position he has taken up will not avail him in the least, for, as observed by the first Court, he as a co-sharer was actively as a mooktear defending this suit on behalf of his co-sharers, that the former decree was passed in his presence, that he was present when in execution of that decree the bund was cut and that not on one single occasion was the fact now urged put forward, *i. e.*, that the former decree was not binding against him as he was not a party to the suit.

It is quite clear that estoppels are not only by record but also in pais, which we may for the purposes of this case describe by conduct of parties. This has been repeatedly held in England, and it is necessary only to cite one or two cases; as for instance Sandys *versus* Hodgson, 10 A and E., 479; Pickard *versus* Sears, 6 A. and E., 469. In Taylor on Evidence, Volume I, page 696, Section 774, it is said:—"So "if a person having a right to an estate "permit or encourage a purchaser to buy "it of another, the purchaser shall in equity "at least hold it against the person who "has the right; and precisely the same "doctrine applies at Common Law to per-"sonal property."

If we were at all concerned in this case with the technical doctrine of English estoppel, we should hold that by the fact (1) of the plaintiff's cognizance of the former proceedings, and by the facts (2) of his never having taken any objection; (3) of his having conducted the suit being present at the local enquiry and at the time of the execution of the decree, he is precluded now from bringing the present suit; for fortunately for the interests of justice the Courts of this country are governed by a law of far wider operation and efficacy than the doctrine of estoppel. This Court is to be governed in all cases in which the law is not written or defined by judicial decisions, by the principles of justice equity and good conscience. This very principle necessarily obliges the Courts to look to the conduct of a party who asks redress; and if the Court finds that the person who asks for redress is a party who has countenanced the acts of which he complains, the Court is bound to decline to afford any redress or assistance to such an individual.

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We must observe that the candour with which the senior pleader Mr. Twidale for the special appellant has laid his case before the Court, offers a most pleasing contrast to the persistence and untenable arguments which the junior pleader has paraded before us. Mr. Twidale admitted that the judgment of the Lower Appellate Court, as it stood, was unassailable, but he said that there was a point which ought to be considered, *viz.*, whether the bund had been cut at an extent to which it was intended that it should be cut and that in order to avoid a multiplicity of suits we should allow this objection, although it was not taken in this shape in the Courts below; but the answer to this argument may be given in the words of Lord Westbury in the case of Eshan Chunder Singh, Weekly Reporter, Volume VI, page 58, Privy Council Rulings,—that "the state of facts, and the equities and "ground of relief originally alleged and "pleaded by the plaintiff, shall not be de-"parted from;" and further that "it is im-"possible to conclude parties by inferences "of fact which are not only not consistent "with the allegations that are to be found "in the plaint, which constitute the case "the defendant has to meet, but which are in "reality contradictory of the case made by "the plaintiff. It will introduce the great-"est amount of uncertainty into judicial "proceedings if the final determination of "causes is to be founded upon inferences "at variance with the case that the plaintiff "has pleaded, and, by joining issue in the "cause, has undertaken to prove." A great mis-apprehension seems to exist in the minds of some pleaders as to the cases in which a plaintiff should be allowed to amend his case. This can only be allowed in those cases when the plaintiff really has an honest case, but either through mistake or some mis-apprehension has not placed the real facts before the Court. We think the time has arrived when we may fairly expect, with such a powerful bar before the Courts, that every body should ask and be furnished with proper legal advice before he comes into Court, and if without complying with this obvious and available course a party makes his own case and fails we cannot help him out of the difficulties into which he falls owing to his own negligence and carelessness.

We dismiss this special appeal with costs.

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The 30th June 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 10 Act VI (B. C.) of 1862—Share-holder—Proprietor.

Case No. 126 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 21st November 1870, *reversing a decision of the Deputy Collector of that District, dated the 11th March* 1870.

Moolook Chand Mundul and others (Intervenors) *Appellants,*

versus

Modhoosoodun Bachusputty (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellants.

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose and *Taruck Nath Dutt* for Respondent.

Proceedings under Section 10 Act VI (B. C.) of 1862 cannot be taken on the application of one share-holder in a joint undivided estate; the word "proprietor" implying the sole proprietor or whole body of proprietors of the land for the measurement of which application is made.

Loch, J.—THIS was a suit under the provisions of Section 10 Act VI of 1862, B. C., for the measurement of an estate in which the plaintiff alleges he holds an undivided 8 annas share.

The ryots, whose land it was sought to measure and assess, denied that they were tenants of the plaintiff, and Prem Chand and another intervened claiming to be in receipt of rent.

The first Court laid down two issues, 1st.—Whether plaintiff had been in receipt of rents; and 2nd, whether Prem Chand had been in receipt of rent.

The Deputy Collector found both issues against the plaintiff, but on appeal the Judge reversed the judgment holding that "the "intervenor's plea that his ancestors and "plaintiff's ancestors made a division or "partition is not even proved, nor is the "date of such partition even given. Such "a plea cannot, therefore, be entertained. "Plaintiff purchased the estate in 1269, and "as all parties admit his proprietory right "to 8 annas share of the estate which is "held ijmalee and that these lands form "part of the estate and are situated within "it, plaintiff has a right under Section 10 "of Act VI of 1862 to measure these "lands, and a decree is given to him accordingly."

A special appeal was preferred by the tenants, but before the Court entered into the case it was brought to the notice of the Judges that a judgment had been passed by a Division Bench of this Court, E. Jackson and Ainslie, J. J., dated 15th May 1871,* which contained a construction of Section 10, Act VI of 1862, B. C., which, if followed in the present case, would necessarily dispose of this appeal. The Judges there held that the applicant under this (X) Section must be the proprietor of the estate, not a share-holder only in the proprietory lands; that it was not right that such share-holders should have separate measurements; that such proceedings would be productive of great annoyance and harassment to the tenants on the estate, and that the law does not say that any share-holder of an estate may apply to the Collector; and that looking to the remarkable provisions of this Section it should not be extended beyond its plain terms.

A judgment of a Division Bench of this Court reported in I Weekly Reporter, pages 53-54, Trevor and Campbell, J. J., has been referred to as declaring that a share-holder was entitled to measure the lands of an estate; but we find that the judgment in that case was passed with reference to the provisions of Section 26 Act X of 1859, which contemplated a different state of things to that provided for by Secton 10 Act VI of 1862, B. C. Section 26 Act X of 1859 is similar in its terms to Section 9 Act VI of 1862, B. C., which declares the right of a proprietor of an estate or tenure or other person

* 15 W. R., p. 522.

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in receipt of the rents of an estate or tenure to make a general survey and measurement of the lands comprised in such estate or tenure, and to invoke the assistance of the Collector should the tenant, when duly served with notice, fail to attend and point out his land; but Section 10 Act VI of 1862 contains provisions not to be found in any Section of Act X of 1859. It was enacted probably to assist auction purchasers in discovering the lands they had purchased and the tenants who occupy such lands. I cannot suppose hat the law ever contemplated that the provisions of this Section should be made use of, unless in very exceptional cases, by land-holders who have been for any period in quiet possession of their estates receiving rents from the tenants.

Section 10 Act VI of 1862, B. C., provides:—"If the proprietor of an estate or tenure or other person entitled to recover the rents of an estate or tenure is unable to measure the lands comprised in such estate or tenure or any part thereof *by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands or any part of the lands comprised therein*, he may petition the Collector who shall proceed to measure the lands and to ascertain and record the names of the persons in occupation of the same; and on the special application of the proprietor or other person aforesaid, the Collector shall proceed to ascertain, determine and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable." Then comes the penal Clause which is as follows:—"If "after due enquiry, the Collector shall be "unable to measure the land or to ascertain "or record the names of the persons in occupation of the same, or if he shall (in any "case in which such special application "shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands "or any part thereof, *then and in any such "case he may declare the same to have lapsed to the party on whose petition he has "made the enquiry.*" Taking these words as they stand, it would follow that if the party upon whose petition the enquiry was made was the proprietor of ½ an anna share in the estate, the whole of the property regarding which the enquiry took place would be handed over to him. It may be said that only so much as is in proportion to his share would be made over to him, but the law no where says so nor does the law give the Collector any authority to enquire into and determine what is the share of the petitioner in the estate, but directs that in such case the Collector may declare the same, *i. e.*, the property of which the measurement and assessment is sought, "to have lapsed to the party on whose petition he has made the enquiry," be the right of that party what it may.

Possibly, if a person's co-sharers refused to join in making an application to the Collector, they might be made parties to the case, and the measurement, &c., proceed in the presence of all parties, and so the tenants be preserved from the harassment arising from separate measurements being frequently made by the various share-holders. All parties must be before the Collector, and therefore I concur in the view taken by E. Jackson and Ainslie, J. J., that proceedings under Section 10 Act VI of 1862, B. C., cannot be taken on the application of one shareholder in a joint undivided estate. Under this view of the law, I think this special appeal should be decreed and the judgment of the Lower Appellate Court reversed and that the suit should be dismissed with costs in all Courts.

Ainslie, J.—The question is whether the words "if the proprietor of an estate or tenure" in Section 10 Act VI of 1862 of the Bengal Council are to be read as if they were "if any sole proprietor or any one of several co-proprietors of an estate or tenure" or whether they imply a sole proprietor or entire body of joint proprietors owning an estate or tenure.

Mr. Justice Loch has pointed out how the tenants may be harassed if every shareholder of a minute fraction of the estate is allowed to have a separate measurement, and how inconsistent the provision in the Section in question quoted in the margin* is with the theory that every share-holder can separately call on the Collector to measure.

If after due enquiry the Collector shall be unable to measure the land, or to ascertain or record the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such land or any part thereof, then and in any such case he may declare the same *to have lapsed to the party on whose petition* he has made the inquiry.

I would further refer to Section 112 Act X of 1859 (and the corresponding Section 68 of Act VIII of 1869) in which it is provided that no sharer in a joint estate or other tenure in which *a division of the*

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lands has not been made amongst the sharers shall exercise the power of distraint otherwise than through a manager authorized to collect the rents of the whole estate or tenure on behalf of all the sharers in the same.

The words used in the earlier part of this Section are *the* zemindar, lakherajdar, farmer, &c., or other person entitled to receive rent immediately from such cultivator, may recover the same by distraint and sale of the produce of the land on account of which the arrear is due.

The words used to describe the persons entitled to distrain are in the singular number, and are much the same in form as those in Section 10 Act VI of 1862, but the proviso shows that they are to be taken as limited to the owner, farmer, &c., of *defined lands* or to the whole of the co-owners of such lands acting as one body. And it is clear that, if this were not so, the ryot might be infinitely annoyed and the co-sharers put at a great disadvantage.

Reading Act VI of 1862 by the light of this Section, and it must be remembered that it is, so far as these Measurement Sections are concerned, merely an extension of Section 26 Act X of 1859, and that by Section 21 (Act VI) it is to be read with and taken as part of the earlier Act, I entertain no doubt that the proper construction of estate or tenure in Section 10 is one that limits these terms to certain specific lands *the whole* of the rents of which go to the person presenting the petition.

The provisions of Section 108 of Act X of 1859 (now Section 64 Act VIII of 1869) also show clearly that a single shareholder's rights under the Act are by no means co-extensive with those of a sole proprietor, or body of joint proprietors.

He cannot sell the tenure on which the default accrued at all until he has proceeded against the moveable property of the defaulter and brought it to sale (if any be found) and when he does sell the tenure he cannot sell it under Section 105 and Act VIII of 1865, B. C., but can only sell rights and interests of the defaulter under Section 110 and Act VIII of 1859.

I entertain no doubt that in the 10th Section of Act VI, the word proprietor must be read as implying the sole proprietor or whole body of proprietors of the whole of the land for the measurement of which application is made.

The 3rd July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Issues—Res judicata — Regulation VIII of 1819 — Putnee sale — Refund of purchase money.

Case No. 143 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 23rd November 1870, *affirming a decision of the Subordinate Judge of that District, dated the 15th January* 1869.

Khelut Chunder Ghose (Defendant) *Appellant,*

versus

Kishen Gobind Deb (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

No one for Respondent.

An issue on a fact is open to determination as between plaintiff and defendant, although a finding on that fact has been arrived at between those parties in a former suit in which they were both defendants.

HELD by Jackson, J., (Mookerjee, J., dubitante) that a zemindar who puts up for sale a putnee under Regulation VIII of 1819 guarantees to the purchaser that there are some lands appertaining to the putnee, and if it turns out that there are no such lands, (that there is in fact no such putnee), the purchaser will be entitled to recover his purchase-money.

Jackson, J.—THIS was a suit to recover from the defendants the amount of purchase-money paid by the plaintiff for a putnee talook at a sale held under the provisions of Regulation VIII of 1819. The defendants were both the zemindar who put up the putnee to sale and the defaulting putneedar, who had each received a portion of the purchase-money. The plaintiff alleged that the result of a subsequent suit by a neighbouring putneedar was to set aside the putnee sale, and that he was accordingly entitled under Section 14 Regulation VIII of 1819 to recover the purchase-money.

Both Courts have decreed to the plaintiff as against each defendant the proportionate share which each obtained, and against the zemindar have further decreed the costs and expenses which the plaintiff incurred. The defaulting putneedar does not appeal. But the zemindar has preferred this special appeal. On his behalf, it is alleged that the

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first Court has found upon the evidence that the decree which is said to have been passed setting aside the putnee sale was obtained through the fraud and collusion of the present plaintiff, and that the Judge has taken no notice of these circumstances, and that if this is a correct finding the plaintiff will not be entitled to recover. The following is the finding of the first Court alluded to in the argument.

"The *ex-putneedar* instituted an action "to set aside the auction-sale, but thinking "that the sale was held legally and he "would not be able to get it reversed, "caused a suit to be instituted, whether "legally or illegally, by a third party on "the allegation that the said putnee talook "appertained to some other mehal, and then "caused the putnee sale to be set aside and "also allowed the suit instituted by himself "to be dismissed for default—hence it can "be strongly inferred that the *ex-talook-*"*dar* colluded with the plaintiff Chunder "Monee."

The question before us is, how far such a finding would affect the distinct provisions of Section 14 Regulation VIII of 1819. The finding in the first place is directly against the finding of fact arrived at in the former suit. But the issue on that fact is open to determination as between the present plaintiff and defendant, because although both were parties to the former suit they were both defendants in it. On that occasion on the suit of a third party it was decided that the mouzah the putnee of which had been sold belonged to another putnee, the result admittedly being that no lands remained to form the putnee which was sold. It is said that this was virtual setting aside of the sale. It has been argued before us that this did not amount to a setting aside of the sale. It is true that the sale is so far not set aside, that if the purchaser could find out any other lands as belonging to the putnee he would still be entitled to them. But it seems to be not denied that there are now no longer any lands belonging to this putnee. If this was a correct determination, the zemindar put up for sale a putnee which contained no lands. I think that a zemindar who puts up for sale a putnee under Regulation VIII of 1819 guarantees to the purchaser that there are some lands appertaining to the putnee and that if it turns out that there are no such lands, that there is in fact no such putnee, the purchaser will be entitled to recover his purchase-money.

It was argued by Baboo Romesh Chunder Mitter that a purchaser at a putnee sale is in the same position as a purchaser at a Civil Court execution sale. But I cannot concur in this view. In the latter case, only the rights of the judgment-debtor are under the law put up to sale, and the purchaser takes his chance as to what those rights are. In the former case, the law gives the zemindar a special speedy mode of recovering his rents by putting up the putnee for sale. And Section 14 Regulation VIII of 1819 was enacted making the zemindar responsible for his acts, and liable for all damages if the sale is set aside "on any ground."

Then it was argued that a zemindar making such a sale is in the same position as if he had made a private sale. I think he is in much the same position, but there is the special provision of Section 14 Regulation VIII of 1819 which is applicable to him if the sale is set aside, whereas there is no direct statute law applicable to a private sale. But even taking this view of the law, and supposing that this was a private sale, if the zemindar had sold to the plaintiff a putnee which contains no lands, the plaintiff is entitled to recover the consideration which he paid for the purchase. The zemindar in such a sale guarantees to the purchaser that he is selling a putnee which is to be found, and not a myth. The plaintiff might, I think, have in the former suit asked the Court, under Section 14 Regulation VIII of 1819, to require the zemindar to reimburse to him the purchase-money, and the Court, if satisfied that the effect of its decree was to set aside the sale, might under that Regulation have passed the order. I am not prepared to rule that that order might not have been questioned in a subsequent suit. And in this suit I think that it is open for determination upon the facts proved by the evidence whether the plaintiff shall be reimbursed or not. For instance, if, as the first Court has found in this case, it is proved that there had been an existing putnee, and that the lands of the mouzah which the third party obtained in the former decree were the lands of that putnee, and that the decree obtained by the third party was the result of fraud and collusion between the purchaser and the third party, the zemindar being defeated by their machination, I think that under such circumstances the purchaser cannot recover his purchase-money. The purchaser cannot obtain any benefit from his own fraud—such fraud will take the case out of the law. I would therefore remand this case to the

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Judge for a finding on the question of fraud, and for re-determination. Costs of this appeal to be costs in the suit.

Mookerjee, J.—I would also remand this case for re-decision. It appears that the plaintiff was a purchaser at a sale held at the instance of the defendant, Khelut Chunder Ghose, under Regulation VIII of 1819, —who was an auction purchaser of the zemindaree. Plaintiff having purchased the putnee was in possession thereof when a suit was brought by one Chunder Monee claiming the mouzah which comprised the putnee talook, as a mouzah included in her putnee. This suit was decreed in favor of Chunder Monee in the presence of Khelut Chunder and the plaintiff in this case.

Plaintiff having thus lost the putnee brings this suit against the zemindar and the defaulting putneedar Buloram Dass for a refund of the purchase-money paid by him, with other charges incurred for perfecting the purchase aforesaid, with interest.

The defendant Khelut Chunder denied his liability, stated he had not received any portion of the sale proceeds, and pleaded that the plaintiff in collusion with the 3rd party, namely, Chunder Monee, obtained a decree, and that therefore the plaintiff should not be allowed to benefit by his own fraud. Khelut Chunder alleged that he was an auction-purchaser of the zemindaree in 1267, B. S.; that he found there was a putnee recorded in his sheristah in the name of the defaulter, and finding that the putneedar had defaulted, he had sued him under the provisions of Regulation VIII of 1819 and caused the sale of the putnee. The plaintiff was the purchaser, who being the son of the dur-putneedar of this mouzah, had made the purchase with his eyes open and cannot now seek to recover the money he paid.

The Court of first instance was of opinion that the defendant Khelut Chunder throughout acted *bonâ fide*. He was a new comer to the estate, and being unacquainted with the circumstances of the case could not effectually meet the claim of Chunder Monee. The Court also held that the plaintiff was only a nominal purchaser; the real person who purchased was the father of the plaintiff who was in possession of this property as a dur-putneedar and who was acquainted with all the particulars of this putnee, but who, instead of assisting the defendant Khelut Chunder, rather assisted the plaintiff Chunder Monee: and that both the son and father "devoted their attention" *i. e.*, made every endeavour, to get the sale set aside in order "to enjoy this mouzah as rent-free." The Subordinate Judge, therefore, was decidedly of opinion that the plaintiff is guilty of fraud while the defendant acted in perfect good faith throughout. He however gave a decree against the defendant Khelut Chunder for a portion of the claim, as he was of opinion that the law left him perhaps no option in the matter. He says—"The sale having been set aside, the "auction-purchaser is of course entitled to "get back the purchase-money: he has "suffered a loss to the amount of the stamp-"duty of the bynamah; he is also entitled "to get the interest on the same and what-"ever he has paid in as rent to the zemin-"dar."

On appeal, the Judge of Sylhet confirmed this decree. He takes no notice of the fact found by the Court below as to whether the plaintiff is guilty of any fraud or not, but in a very short decision upholds the decree of the Court below, simply stating "that the sale having been set aside, plaint-"iff is entitled to get back the money he "paid with interest." He also states "it "may be that appellant acted in good faith, "but that is no reason why the plaintiff "should suffer loss and appellant gain."

Against this decision, the defendant appeals specially and urges that the Judge ought to have inquired as to whether the plaintiff was in fraud with Chunder Monee, for if he is so there can be no doubt that he will not be allowed to succeed. It is also urged that in a sale held under Regulation VIII of 1819 the zemindar guarantees nothing but merely sells the right and title of the defaulting putneedar,—and that if the purchaser without any inquiry makes a purchase of a property which the vendor sells in good faith believing the property to be his own, the rule of *caveat emptor* applies and the purchaser should not be allowed to recover back the purchase-money.

We are referred to a decision of the Full Bench reported in the XII Weekly Reporter, page 8, Full Bench Rulings, wherein the learned Judges have held that a purchaser in a sale in execution of a decree cannot recover back his purchase-money when a third party succeeds in establishing his title to the property, unless there is fraud or mis-representation on the part of the decree-holder.

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I am not at all sure that a zemindar procuring a sale of his putnee for arrears under the provisions of Regulation VIII of 1819, guarantees a title in the defaulting putneedar. It is said that Clause I Section 14 Regulation VIII of 1819 applies to the case. I am extremely doubtful that it does. It appears to me that the Clause aforesaid applies to cases in which the object of the suit is to set *aside* the putnee sale. Though the Section does not distinctly speak of the defaulting talookdar, yet from the context and from the use of the words "It shall however be competent to any party desirous of contesting the right of the zemindar to *make the sale*, &c., to sue the zemindar for the reversal of the same," and then again "upon decree passing for *reversal of the sale*," it appears to me that the Clause in question contemplates suits by the defaulting talookdar alone, whether on the ground of there having been no arrears due or for informality and irregularity in the conduct of the sale or the due service and publication of the processes required in conducting it. The words of this Section are indeed large enough, but I think that they do not contemplate any other person than the defaulter.

Legally and strictly speaking, the suit brought by Chunder Monee was not a suit brought to contest the right of the zemindar, Khelut Chunder, to *make a sale*, nor was it a suit to set aside the putnee sale to the plaintiff; and the decree in favor of Chunder Monee is not a decree *reversing the sale* of the putnee tenure. The effect, however, in this particular case, is that the plaintiff has lost all the lands comprised in his putnee, but this is, I apprehend, an accident. Suppose that the suit of Chunder Monee was for a few beegahs of land and he had succeeded in getting a decree for them, it would not and could not be contended that the effect of such a decree was to set aside the sale of the talook. The Court in that case would not have been competent to award to the purchaser the refund of any portion of the purchase-money paid by him or "indemnify him against any loss at the charge of th zemindar *or person* at whose suit the sale may have been made. The words "*any party*" and "*any other ground*" do not point clearly to a third party who has no interest or right whatever to set aside the putnee sale, but who sues to obtain possession of the lands comprised in the talook as lands to which he is entitled as belonging to his estate. Similarly, we find *or person* used at the end of the Clause in the Section aforesaid, after the word zemindar. It is not at all clear who that *person* means, for under Section 8 of that enactment none but zemindars can apply for the sale of a putnee tenure.

In Clause 4 Section 3 of Regulation VII of 1825, which was the law for the sale of immoveable properties before the enactment of Act VIII of 1859, we also find the words "whenever a public sale may be set aside as invalid under the preceding clause *or on any account whatever*, and no collusion or fraud shall appear on the part of the purchaser, he shall be entitled to receive back his purchase-money;" but it has now been ruled, and authoritatively ruled, that the Clause in question as well as Section 258 of Act VIII of 1859 refer to cases in which the sale is set aside in a summary way for irregularities, &c., in conducting the sale.

I wish, however, to pass no decided opinion as to whether, if a zemindar sells a putnee *bonâ fide* believing the defaulting putneedar was the proprietor of it, the rule of *caveat emptor* would apply or not. It is not now necessary to give any opinion at all on the question.

I perfectly agree with my learned colleague that the case should be remanded to the Judge to find whether or no the plaintiff or his father (if the plaintiff is proved to be nobody else than a benameedar for his father) was in fraud and collusion with Chunder Monee and had been instrumental in procuring the decree in favor of him. If this issue of fact is decided by the Court below in favor of the defendant, I apprehend he would be out of Court; as no Court of Justice would then be disposed to assist him in recovering the amount of the purchase-money on a cause of action brought about by him in fraud of the defendant. No man should be allowed to benefit by his own wrong or fraud, and if the plaintiff is found to have colluded with Chunder Monee in defrauding the defendant, he should not be allowed to sue the zemindar for a refund of the money paid by him.

Remand accordingly.

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The 4th July 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Act VIII (B. C.) of 1869—Intervenor —District Judge—Appeal.

Case No. 247 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 13th December 1870, affirming a decision of the Moonsiff of that District, dated the 9th August 1870.

Issur Chunder Sein and others (Plaintiffs) *Appellants,*

versus

Bipeen Beharee Roy and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

It is not necessary to admit an intervenor in a rent suit under Act VIII (Bengal Code) of 1869, if his interest cannot be injured by a decree therein.

The words "District Judge" in Section 102 Act VIII (Bengal Code) of 1869 mean the Judge of the District, and not any Subordinate Judge to whom the case may be transferred for disposal; and an appeal therefore lies under that Section in a case tried by a Subordinate Judge.

The following order was made in this case in the first instance:—

Loch, J.—In this case, the plaintiff sues to recover rent under a kubooleut given by the defendant, and the only question to be tried is whether the defendant did or did not give that kubooleut. If it is found that he did so, the plaintiff will be entitled to a decree. We do not think that this case has been properly tried. The Lower Appellate Court has gone at great length into the question whether a third party can be admitted in suits for rent under Act VIII of 1869, Bengal Code, as an intervenor, and, having disposed of that point, it goes on to find that this kubooleut had been collusively obtained; but it does not properly find on the evidence whether that was or was not the case, namely, whether or not the defendant had in reality executed the kubooleut.

We may observe that this is a case in which it is not necessary to admit the intervenor. His interest could not under any circumstance be injured by a decree in the present suit between the plaintiff and the defendant. We may further remark that the intervenor does not say that he is in receipt of rent from the defendant; he merely alleges that he is the real proprietor and in possession of the julkur of which the rent is claimed by the plaintiff.

We think, therefore, that the case must be remanded to the Lower Appellate Court for trial with reference to the above remarks. Costs to follow the result.

The final order in the case was as follows:—

Loch, J.—On this case again coming on this day for hearing, the only objection taken by the respondent is that under the provisions of Section 102 Act VIII of 1869, Bengal Code, no special appeal in this case would lie to this Court. The words of that Section are as follow:—"Nothing in "this Act contained shall be deemed to "confer any power of appeal in any suit "tried and decided by a District Judge ori-"ginally or in appeal, if the amount sued for "or the value of the property claimed, does "not exceed one hundred rupees, in which "suit a question of right to enhance or vary "the rent of a ryot or tenant or any ques-"tion relating to a title to land or to some "interest in land as between parties having "conflicting claims thereto has not been "determined by the judgment." In this case, the judgment appealed against was passed by the Subordinate Judge to whom the case had been transferred. We think that the words "District Judge" in the above Section can mean, and are only intended to mean, the Judge of the District, and not any Subordinate Judge to whom cases might be transferred for disposal. The Legislature intended that where cases under one hundred rupees were tried either originally or in appeal by the District Judge and where no question of right or title or interest in land is adjudicated upon, the judgment of the District Judge in such cases should be final.

We think, therefore, that the judgment passed by us in this case on the 2nd June last must stand, and the case must be remanded for re-trial in accordance with the directions contained in that judgment.

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The 4th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Zemindar—Trespasser.

Cases Nos. 225 to 229 of 1871.

Special Appeals from a decision passed by the Judge of Dacca, dated the 8th December 1870, *affirming a decision of the Moonsiff of Manickgunge, dated the 15th July* 1870.

Shaikh Hemalee and others (Defendants) *Appellants,*

versus

Kumla Kant Banerjee and another (Plaintiffs) *Respondents.*

Baboo Nullit Chunder Sein for Appellants.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

A zemindar cannot compel a trespasser on his land to become his ryot and execute a kubooleut in his favor, and the fact that the zemindar has obtained a money-decree under Section 15 Act XIV of 1859 against a person does not entitle him to treat such person either as a trespasser or a ryot on his land.

Mookerjee, J.—I AM clearly of opinion that these appeals should be allowed with costs.

The plaintiffs instituted these suits to obtain kubooleuts from the defendants. The defendants plead that they are not, and never were, the tenants of the plaintiffs and that there never existed any relationship of landlord and tenant between them.

It appears that the plaintiffs had, ere this, sued these defendants as well as one Juggut Bundhoo Roy for possession of certain lands under the provisions of Section 15 Act XIV of 1859 and had succeeded in obtaining possessory decrees against Juggut Bundhoo. In those suits, the present defendants were treated by the plaintiffs, along with Juggut Bundhoo, as trespassers on his land. After obtaining decrees against Juggut Bundhoo, the plaintiffs have now sued the defendants for kubooleuts.

I think that the plaintiffs have no right to compel the defendants to execute kubooleut in their favor unless and until they prove that the relation of landlord and tenant subsists among them. I do not see how a zemindar can compel a trespasser on his lands to become his ryot and execute a lease in his favor. The defendants deny they are his ryots and contend that no relationship of landlord and tenant ever existed between them. It is no part of the plaintiffs' case that there was any such relation between them, but it is contended that inasmuch as the plaintiffs have obtained a decree for possession, though a summary one, that that entitles them, the plaintiffs, either to treat the defendants as trespassers or as ryots on their land. I am not aware that by any law a trespasser can be converted into a tenant at the mere will of the zemindar and against that of the person who is sought to be made a tenant. A series of decisions of this Court have held that the relation of landlord and tenant constitutes the basis of the jurisdiction of the Collector in regard to suits under Section 23 of Act X of 1859.

The lower Courts were of opinion that "as appellants (the defendants in this case) "were parties to the summary suit for possession and the respondent was successful "in that suit and took possession by proclamation, that for the purposes of the "present suit, it must be held that the relationship exists."

I would rather think that the fact of the plaintiffs having sued the defendants in the suit under Section 15 of Act XIV of 1859 is a strong piece of evidence to show that they were not the ryots of the plaintiffs, but were trespassers on his land. Indeed, it is admitted before us by the pleader for the respondent that the defendants were placed

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upon the land by Juggut Bundhoo after he had dispossessed the plaintiffs and that no rent has ever been realized by his client from these defendants.

Under these circumstances, I am of opinion that the present suit for kubooleuts must fail. The admission of the pleader for the respondent renders it quite unnecessary to remand this case, for there is no evidence in the record to show that the relationship exists.

The suit of the plaintiffs will be dismissed and the special appeal decreed with all costs.

Jackson, J.—I concur.

The 5th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Omission by Court—Duty of Pleader.

Case No. 238 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 25th November 1870, *affirming a decision of the Subordinate Judge of that District, dated the 24th March* 1870.

Hussun Ali Chowdhry and others (Defendants) *Appellants,*

versus

Nassirooddeen and others (Plaintiffs) *Respondents.*

Baboos Nullit Chunder Sein and *Huree Mohun Chuckerbutty* for Appellants.

Baboos Doorga Mohun Doss and *Rebutty Churn Banerjee* for Respondents.

Where a Judge has omitted to try a point which was urged before him, it is the duty of the Pleader, after the decision, to point out the Judge the omission, and, if necessary, an application for review may be filed.

Jackson, J.—THE ground of special appeal in this case is that the Judge has given no opinion upon the allegation put forward by the defendant, which, if proved, would have caused the plaintiff's suit to be dismissed, unless he was willing to pay down the amount of the money which the defendant admits he paid for the disputed land. The defendant's allegation was that he purchased this land at the request of the plaintiff, and that he was induced to do so on a verbal agreement that the plaintiff would pay the amount of the purchase-money and the defendant would then re-convey the property.

This point is alluded to by the first Court in its decision, although there is no direct issue on it: it is alluded to also in the statement of the facts of the case by the Judge. But no decision was passed on it by the Judge. It is one of the points of special appeal before us, and the pleader who argued the case before the Judge has certified that the point was urged before the Judge, but that there was no decision upon it. This may have happened through mistake. The Judge is generally so very careful in his decisions that we have some hesitation upon the point. But as the case has been admitted to special appeal, and as it seems important that this question should be decided, and as that is the turning point of the whole case, every thing else appearing to be admitted, we think we must remand this case to the Judge for a decision on this point.

We would mention that on future occasions when a point is urged before the Judge, and the Judge has omitted to try it, it is the duty of the vakeel who urged that point before the Judge to go before him after the decision and to point out to him that he has omitted to decide the point. If necessary, an application for review may be filed. The Judge can then determine that point and pass orders upon it. The parties ought not, because of such a mistake, to be driven to a special appeal and put to unnecessary trouble and expense on a point which can be easily rectified by the Court below.

We shall make no order about the costs of this appeal.

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The 5th July 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Revival of suit—Notice to opposite party.

In the matter of

Huro Mohun Mookerjee, *Petitioner,*

versus

Mohendronath Ghose, *Opposite Party.*

Baboo Anund Chunder Ghosal for Petitioner.

No one for Opposite Party.

Before a suit can be revived notice should be served upon the opposite party to appear in support of the decree as originally made.

Loch, J.—THE petitioner in this case, Huro Mohun Mookerjee, has applied to the Court to set aside an order made by the Deputy Collector of Diamond Harbour, bearing date the 29th July 1870, by which the said Deputy Collector, without giving any notice to the petitioner who had already obtained a decree against the defendant, Mohendro Nath Ghose, set aside the said decree and ordered the suit to be revived on a petition of the said defendant. Notice has been served upon the opposite party, but he does not appear to oppose the application. The Deputy Collector was also called upon for an explanation; and he has stated as follows:—"This case was first "decreed *ex-parte.* In execution, which "was sued out from the Moonsiff's Court "after the transfer of Act X cases to the "Civil Courts, the defendant appeared and "presented a petition to the Moonsiff under "Section 58 of Act X of 1859. The Moon-"siff forwarded the petition to this Court, "before which the defendant was duly ex-"amined, and this Court being satisfied of "the non-service of summons on the de-"fendant as well as of failure of justice in "his behalf, admitted the petition and di-"rected a revival of the case under Section "58 of Act X. The Court then fixed a "date for the hearing of this case and issu-"ed notices to both parties to attend in the "same manner as if it were altogether an "original hearing of the case." Further on the Deputy Collector says:—"The un-"dersigned submits most respectfully that "no such notice is required by law to be "given, and that the order in consequence "was not illegal as alleged. The enquiry "held at this stage of the proceedings was "to ascertain simply whether the summons "was duly served upon the applicant for "revival, and justice failed for his non-ap-"pearance, of which the due reason he was "to adduce before the Court. The law, as "the undersigned humbly submits, does not "contemplate that any notice is to be given "to the opposite party to attend at this en-"quiry. It merely provides that no decree "(meaning the *ex-parte* decree) is to be "reversed or altered without notice to "the decree-holder, a procedure evidently "intended to be taken after the revival "is admitted and a re-hearing held "on the merits; vide concluding part of "Section 58 Act X of 1859. The re-hear-"ing in this case which followed such re-"vival was held in the presence of both "parties, of which a due notice was already "served on the appellant."

Now, looking at the provisions of Section 58 of Act X of 1859, we find that in all cases decided *ex-parte,* if the party against whom judgment has been given shall appear, either in person or by agent, if a plaintiff, within fifteen days from the date of the Collector's order, and, if a defendant, within fifteen days after any process for enforcing the judgment has been executed, or at any earlier period, and shall show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs, or otherwise, as he may think proper, revive the suit and alter or rescind the decree according to the justice of the case; but no decree shall be reversed or altered without previously summoning the adverse party to appear and be heard in support of it. We think that the Deputy Collector is wrong in his view of the law when he says:—"The enquiry held at this stage of the pro-"ceeding was to ascertain simply whether "the summons was duly served upon the "applicant for revival, and justice failed "from his non-appearance." It is something more than that. It is asking the Court to revive a suit, and by that revival virtually putting the suit in the same position as it was before, and setting aside the decree originally passed. It is true that when a case is once revived and evidence is heard, the former decree may be affirmed;

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but the very act of reviving the suit has the effect of setting aside the decree already passed and of opening out the question which was at issue between the parties. And therefore we think that before a suit can be revived, notice should be served upon the opposite party to appear in support of the decree as originally made; for it is quite possible that the party may be able to adduce evidence sufficient to shew that summons had been regularly and properly served upon the defendant, and that the application to revive the suit is not made on such good and sufficient cause as to induce the Court to act under the provisions of this Section; and we may observe further that it is opposed to general principles of justice that any order passed by a Court should be set aside simply on the application of one party without giving due notice to the other party to appear and support it, and that the decree-holder has as much right to produce evidence in support of the service of notice as he has to produce evidence in support of any other part of a case.

As no one appears to oppose this rule, it is made absolute and the order of the Deputy Collector is set aside with costs, which we assess at one gold mohur.

Mitter, J.—I concur.

The 19th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 53 Act XI of 1859—Purchase by co-proprietor — Incumbrances.

Case No. 2215 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 27th June 1870, *affirming a decision of the Subordinate Judge of that District, dated the 17th November* 1869.

Mahomed Gazee Chowdhry (one of the Defendants) *Appellant,*

versus

Pearee Mohun Mookerjee (Plaintiff) and others (Defendants) *Respondents.*

Baboos Kallee Mohun Dass and *Rash Beharee Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

Any co-proprietor purchasing an estate sold for arrears of Government revenue re-purchases it subject to all incumbrances existing at the time of sale, even if the purchaser is a non-defaulting proprietor and the incumbrances were made by defaulting proprietors.

Such co-proprietor so purchasing is in the same position whether he purchases benamee through a third party, or purchases it from the third party after the latter has purchased it for himself.

Jackson, J.—The plaintiff in this case sued to recover possession of certain talookee rights in certain mouzahs in pergunnah Hamoabad, which had formerly been in the possession of his vendors Ashruf and Ekramooddeen, but from which they had been dispossessed in consequence of a sale for arrears of Government revenue, at which, it was alleged, that the defendant Mahomed Gazee, one of the former co-proprietors of the estate, re-purchased the whole estate in *benamee.* It was alleged that under these circumstances, these talookee rights, though they were obtained from one of the co-proprietors, and not from the defendant Mahomed Gazee, were not invalidated by the sale and that the plaintiff was accordingly entitled to recover those rights.

There was in the first place an allegation on the part of the defendant that the purchase which was in the name of Mr. Delanny, was not made benamee for him, and there has been an argument in this Court that the grounds upon which both the Courts have come to the conclusion that such purchase had been benamee are not sufficient in law. But it is unnecessary to look to these grounds, because under Section 53 Act XI of 1859 the very fact that Mahomed Gazee was formerly a co-proprietor and had subsequently re-purchased this property, is sufficient to bring him within the purview of that law, under which it is declared that such purchase is made subject to all the incumbrances existing at the time of sale.

Another answer on the part of the defendant was that the vendors of the present plaintiff had surrendered their talookee rights by taking an ijardaree lease subsequent to the sale. And another point has

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been argued before us, *viz.*, that under Section 53 Act XI of 1859, only the incumbrances of the purchasing proprietor are to be respected and not the incumbrances made by the defaulting proprietor. Both the lower Courts have gone into the question on the fact of the ijardaree lease subsequently taken by the plaintiff's vendors, and have come to the conclusion that the plaintiff's rights now claimed will not be affected by any such lease. Looking to all the facts of the case, it is extremely probable, as the lower Court has found, nay we may say that it is evident, that those subsequent arrangements were entered into because it was supposed that a sale for arrears of revenue had taken place, and that Mr. Delanny was the real purchaser at that sale. There seems to be no ground whatever for believing that if the plaintiff's vendors had known that this was a benamee purchase for one of the defaulting proprietors, they would have surrendered their talookee rights for rights of a lower class. It is said that the Judge has decided this point although it was not distinctly urged, the allegation of the plaintiff being the denial of the execution of this ijardaree lease, and it was the business of the Judge to have sent down this point as to whether the lease had been executed or not for trial by the lower Court, or the Judge should have himself tried the point and allowed evidence to be adduced by the parties. If it had been necessary to try that point, the Judge would have been bound to fix an issue. But it is clear that the Judge was of opinion that even admitting the ijarah lease to have been executed, still the plaintiff's rights had not been injured thereby; that the talookee lease which existed before the sale still existed after the sale, looking to the circumstances under which the sale took place.

Then we come to the last and final point, *namely*, whether looking to the terms of Section 53 Act XI of 1859, this talookee lease, even if it be the case that it was a lease granted by some of the defaulting proprietors, can, under those circumstances, stand. The words of Section 53 are very distinct: they do not say that where of three co-proprietors of an estate two default and one pays up his shares, that if the non-defaulting proprietor purchases the estate, he purchases it free from all incumbrances made by the non-defaulting proprietor. On the contrary, the words are very distinct and lay down that any co-proprietor purchasing an estate re-purchases it subject to all the incumbrances. In this case, therefore, the re-purchase by Mahomed Gazee was subject to subordinate talookee rights of Ashruf and Ekramooddeen which the plaintiffs now claim.

No ground, therefore, in our opinion, has been shown for interfering with the decision of the Lower Appellate Court, and we dismiss the appeal with costs.

Mookerjee, J.—I am also of the same opinion. The contention raised in this Court that the lower Courts were wrong in holding that the appellant, Mahomed Gazee, purchased the zemindaree benamee using the name of Delanny, becomes immaterial when it is admitted by the appellant that he had purchased from Mr. Delanny the property afterwards. It is also admitted that Mahomed Gazee was one of the proprietors of this zemindaree before it was sold for arrears of Government revenue. The question as to whether the original purchase of Delanny was benamee or not becomes of no importance when it is admitted that by a purchase from Delanny defendant is now the owner of the entire zemindaree of which he was a co-partner at the time of the revenue sale. Section 53 Act XI of 1859 is strictly and entirely applicable to his case.

Whether Mahomed Gazee originally purchased in the name of Delanny for his own benefit, or whether he, Delanny, purchased for himself and then sold to Mahomed Gazee, the rights of that individual would in either case be the same, namely, that he would by his "purchase acquire the estate subject to "all its incumbrances existing at the time "of sale, and shall not acquire any rights in "respect to under-tenants or ryots which "were not possessed by the previous pro-"prietor at the time of the sale of the said "estate." This contention, therefore, even if correct, is wholly unavailing.

It is next contended by Baboo Kallee Mohun Dass that the incumbrance in question having been made by a co-sharer of this zemindaree, and not by his client, the appellant, he is not bound to respect the same but can annul it at his pleasure. This argument is, I think, unsound. The law distinctly lays down that any "recorded "or unrecorded proprietor or co-partner "who may purchase the estate of which he "is proprietor or partner, or who by re-"purchase or otherwise may recover pos-"session of the said estate after it had been "sold for arrears under this Act," shall acquire the estate subject to all its incumbrances existing at the time of the sale. It does not say subject only to all incumbrances

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created or imposed by the re-purchasing co-partner, but all incumbrances existing on the estate at the time of sale. The rights of purchasers under this Section appear to me to be very nearly of the same nature as the rights conferred on purchasers at a sale in execution of decrees of Civil Courts. Purchasers in sales held in execution of decrees of Civil Courts as well as purchasers in the position of Mahomed Gazee are both bound to respect incumbrances created by the previous owner and existing at the time of the sale. This Section appears to me to have been intended for the security of under-tenants and ryots, &c., in cases where a co-partner purchases the zemindaree at the sale or re-purchases it or otherwise recovers possession of it from another person who purchased it at the revenue sale. It is not denied that the plaintiffs had a talookee right in the mouzah claimed, and as that right existed at the time of the sale the defendant Mahomed Gazee is bound by law to respect it.

It is lastly contended that the plaintiffs had given up their talookee rights by accepting an ijarah lease of the mouzah for one year, and that consequently they have no right to maintain this action for recovery of the talook. The Courts below have, however, found that there is no proof of this surrender, and the Lower Appellate Court holds also that even if it be conceded that the plaintiffs accepted an ijarah lease of the mouzah and that that acceptance amounts to a relinquishment of their talookee rights, still that the lease was executed not to the defendant Mahomed Gazee but to Mr. Delanny who was at the time believed to be an actual and *bonâ fide* purchaser of this zemindaree. The plaintiffs subsequently found that Mahomed Gazee was the real purchaser in the name of Delanny, and therefore plaintiffs have every right to sue him, the defendant, for the recovery of their talook. If Delanny was the real purchaser the rights of the plaintiffs to the talook had gone, and whether plaintiffs relinquished or not Delanny was by law armed with powers to set aside and hold at nought the talookee rights of the plaintiffs. But I do not think that a surrender of the rights to Delanny on the belief that he was the real purchaser at the revenue sale can avail the defendant. When defendant re-purchased, he was bound by the incumbrances which existed at the time of the sale. I would also dismiss this appeal with all costs.

The 7th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint proprietors—Ejectment—Right of action — Benamee-purchase — Voidance—Section 53 Act XI of 1859.

Case No 312 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 27th January 1871, *reversing a decision of the Moonsiff of that District, dated the 8th November* 1870.

Alum Manjee (one of the Defendants) *Appellant,*

versus

Ashad Ali (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. H. E. Mendies and *Baboos Sreenath Dass* and *Aukhil Chunder Sein* for Respondent.

One of a number of joint proprietors cannot sue to evict a tenant of land which belongs to them all.

Under Section 53 Act XI of 1859 a *benamee* purchaser on behalf of the old proprietor is not entitled to get rid of the incumbrances created, suffered, or allowed to remain, by the old proprietors before the sale.

Mookerjee, J.—THE suit out of which this appeal has arisen was a suit brought by the respondent to eject the defendant from a third share of 14 kanees of land comprised in 8 plots in the possession of the defendant. The plaintiff states that he is a purchaser at a sale for arrears of Government revenue; that he has purchased this estate along with two other persons, and that therefore his share is one-third of the estate. The plaint gives no information as to what is the character of the possession of the defendant. It merely states, in the vaguest terms possible, that the defendant is in possession. It denies the right of the defendant to the property and states that he is in possession by force and fraud.

The defendant Munsoor Ali pleaded that he was a ryot on the estate, an old ryot who had been in possession of these plots of land from a very long time; that the plaintiff Ashad Ali was not a *bonâ fide* purchaser and had not acquired all the rights of an auction-purchaser at a sale for arrears of

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revenue, inasmuch as he had purchased this estate benamee for his grand-mother, who was one of the old proprietors of it; that the sale was collusively brought about by all the co-sharers in order to get rid of the tenures of the old ryots by being able as auction purchaser to eject them or to enhance their rent. It was also pleaded that the plaintiff, even if he was an one-third ijmalee share-holder of these plots of land, was not in a position to eject a ryot who was a ryot on behalf of the whole of the proprietors. As regards some of the portions of these plots, it was contended that the defendant was a purchaser from certain other old ryots by private sales as well as sales held in execution of decrees of Civil Court.

The first Court dismissed the plaintiff's suit, being of opinion that looking to the evidence adduced by the defendant, namely, of one Grish Chunder Dass, who is one of the joint purchasers of this property, as well as to a copy of a deposition of Ram Chunder Sein, who is the son of one of the old proprietors, Ram Soondur, as also from other evidence and the circumstances of the case, it was clear that the old proprietors had caused the sale by withholding the payment of revenue due on the estate, and had purchased the property in the names of their respective relatives. The Court was also of opinion that the defendant had proved by abundant evidence that he was a ryot of a very long standing on these plots of land, and that the sale was brought about for the purpose of getting rid of the rights of the defendant.

On appeal to the Subordinate Judge, the Subordinate Judge held that the sale certificate proves that the plaintiff purchased the estate and that there was no necessity for entering into the plea of benamee purchase set up by the defendant. The Subordinate Judge continues—"Yet in order to meet the plea it is "observed that Grish Chunder Dass, one of "the witnesses examined by them (defendants) "who also joined the plaintiff in making the "auction-purchase and who is supporting the "defendant's objections, is an auction-pur-"chaser of another proprietor;" and as he has given his own share in ijarah and has nothing to do with the ryots, his testimony cannot be accepted.

The Subordinate Judge also rejects the copy of the deposition of Ram Chunder Sein produced by the defendant. Excluding all this evidence, he comes to the conclusion that the benamee purchase had not been made out by the plaintiff.

The Subordinate Judge also says that the defendant has produced pottahs, sale-certificates, dakhillas, kubooleuts and kobalahs, but as they are not verified he does not think that the defendants are the ryots of the land.

It is contended in special appeal that the Subordinate Judge is wrong in allowing a decree to pass in favor of the plaintiff, who, according to his own showing and allegation, is only an ijmalee proprietor of these lands to the extent of an one-third share; that the other co-sharers not having joined him, it is not in the power of one joint co-sharer to evict a ryot from his holding. * * *
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We think that the first objection is fatal to the plaintiff's claim. If the defendant is a ryot of the plaintiff and his co-sharers, as appears from the papers filed by the plaintiff himself in this case, and as also appears from the sale certificate granted to the defendant by the Civil Court, and of which fact there does not appear to be the slightest doubt, the plaintiff, being one of the joint proprietors, cannot evict the defendant, who is a joint tenant of the same land belonging to the plaintiff and his co-sharers. This point has been settled by numerous decisions of this Court, and I think that the reasons for those decisions are quite cogent and valid. According to those decisions, the suit of the plaintiff on this plea of the defendant should have been thrown out of Court.

As regards the point of benamee purchase the Subordinate Judge was certainly wrong in stating that there was no necessity for entering into that plea, for the point was of the utmost consequence in this case. If the plaintiff was a benamee purchaser on behalf of the old proprietor, then under Section 53 Act XI of 1859 he is not entitled to get rid of the incumbrances, created, suffered or allowed by the old proprietors to remain while they were the proprietors before the sale. * * * * * * *
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Jackson, J.—I wholly concur in the judgment of my learned colleague. I think that on the question of fact as to whether this defendant was a tenant, the decision of the Subordinate Judge is directly at variance with all the evidence in the case. * *
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I quite concur with my learned colleague on the point of law, that the plaintiff being

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a joint proprietor of the estate, cannot sue to recover one-third of the joint tenure. This point has been ruled over and over again. As the defendant is a tenant, the plaintiff's suit must be dismissed with all costs.

The 7th July 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Co-sharers—Joint-property—Rights.

Case No. 384 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 31*st January* 1871, *affirming a decision of the Moonsiff of Bullia, dated the* 31*st August* 1870.

F. H. Holloway (Defendant) *Appellant,*

versus

Mahomed Ali and others (Plaintiffs) *Respondents.*

Baboos Hem Chunder Banerjee and *Nil Madhub Sein* for Appellant.

Moonshee Mahomed Yusoof and *Baboo Boodh Sein Singh* for Respondents.

A co-sharer in landed property has no right to do any thing which alters the condition of the joint-property without the consent of the other co-sharers.

To build a factory on such property, only upon a title derived from one co-sharer without the consent of the others, involves an infringement of the rights of those co-sharers, and this infringement involves an injury.

Bayley, J.—We think this special appeal must be dismissed as utterly groundless.

Three pleas have been taken before us :—1*stly*—That a co-sharer in landed property has a right to do anything (*e. g.*, to commence a building) which alters the condition of the joint-property, without the consent of his co-sharers.

On this point which we have put in the very words of the pleader, if the word "no" be prefixed to word "right" it will, in the exact words, convey the ruling of Mr. Justice Louis Jackson and Mr. Justice Glover, in a case reported at page 171, Volume X, Weekly Reporter. My colleague, Mr. Justice Ainslie, has pointed out to us the above decision, which we consider fully disposes of the plea taken ; but the pleader for the appellant, Baboo Hem Chunder Banerjee, has, after a prolonged argument, relied on a case reported at page 65 of the Bengal Law Reports,* Volume III, the facts of which we have no hesitation in saying are not the facts of this case. That was a case for the rent of certain lands attached to a dwelling house which the defendant was deemed entitled to hold at an equitable rent, in which it was decided that such a suit could not be maintained in the Revenue Court.

Another case reported at page 67, Bengal Law Reports,† Volume III, Appendix, has

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* 11 W. R., p. 410.

† The 26th May 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Case No. 404 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 21*st November* 1868, *affirming a decision of the Moonsiff of Pursa, dated the* 14*th February* 1868.

Lalla Bissumbhur Lall (one of the Defendants) *Appellant,*

versus

Rajaram and another (Plaintiffs) *Respondents.*

Mr. R. T. Allan and Baboo Bhowanee Churn Dutt for Appellant.

Baboos Mohesh Chunder Chowdhry, Romesh Chunder Mitter and *Doorga Dass Dutt* for Respondents.

Peacock, C. J.—One issue raised by the Subordinate Judge was "whether the said land being joint, the defendant's erecting a wall of the house over the said joint land is valid, or whether the said wall ought to be demolished." He then in his judgment proceeds to show that the land is joint, and he says that "in compliance with what has been above alluded to, it is proved that the said land is conjointly held by both parties; under these circumstances, the defendant's erecting a wall of his house on the conjoint land, without the accord and consent of the plaintiff, is by all means unlawful; nay, the said wall is fit to be demolished. Therefore it is ordered that the appeal be dismissed,"—the substance being that the wall was to be demolished. It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, that this is not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights.

It appears to me that this is a case in which apparently no injury to the plaintiff has been caused by the erection of the wall, and that therefore the plaintiff ought to be left to such remedy as he may have, without applying to a Court of Equity for assistance in having the wall demolished. He may, if he think fit, apply for a partition, but I do not think that it would be equitable, after the defendant has gone to the expense of building the wall upon the land of which he was a joint owner, to have that wall demolished at the suit of his joint co-sharer, without showing that it causes any injury to the plaintiff.

Under these circumstances, I think that the appeal ought to be allowed, and the suit of the plaintiff dismissed with costs.

Glover, J.—I concur.

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been also relied upon, but in that case it was simply held that where two parties were the joint owners of land and one of them completed the erection of a wall upon the land without obtaining the consent of his co-sharer, the Court would not interfere to order the demolition of the wall where there was no evidence to shew that injury had been done to the co-parcener of the builder by its erection.

This brings us to the second point, which is that no injury had been caused to the plaintiff.

Now, the second plea must be considered by the light of the ruling cited on the first point in support of our decision on that point, *viz.*, that a person has no right to do anything without the consent of his co-sharers which alters the condition of the joint property. To build a factory only upon a title derived from one co-sharer without the consent of the other co-sharers would no doubt involve an infringement of the rights of those co-sharers, and this very infringement involves an injury.

We have been pressed with a doctrine of law from which, however, we do not differ, which has been recognized so far back as the year 1856 in Janokee Dassee's case, *viz.*, that where a co-parcener stood by and saw the *completion* of a building on the joint land commenced without his permission, without raising any kind of objection to it, he must be supposed to have impliedly consented thereto; but in the present case the building was not completed. The objection was taken when or shortly after the erection was commenced, and an injunction actually obtained directing to stop the further progress of the building. Moreover, the defendant Holloway in this case admittedly derives his title from Omrao Singh whose proprietary right in the property has been found by the Lower Appellate Court to be very small (1½ cowries) and who alleged himself to be *firstly* a kastkar and *then* a malik. His kastkaree title has been found to be a forgery, and therefore the defendant has simply to base his title as derived from a malik of a very small portion of a joint undivided property. Were we to say that in a case like this no demolition of the building ought to be allowed, we should have to declare that a party is entitled, in the double capacity of a malik and kastkar, to give title over a whole ijmalee property, when as kastkar he has no proprietary title and as malik only a small fractional one.

I am reminded by Mr. Justice Ainslie that the very case quoted from page 67, Appendix, Volume III, Bengal Law Reports,* contains a dictum of the late Chief Justice Sir Barnes Peacock which would be entirely against the appellant even if he had any legal right, *viz.*, that "a man may insist upon "his strict rights, but a Court of Equity is "not bound to give its assistance for the "enforcement of such strict rights." In the present case, however, the defendant had no such right over the whole property, and it follows that a Court of Equity had no occasion to lend its aid.

In this view, we dismiss this special appeal with costs.

The 10th July 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Partnership — Right of action — Accounts.

Case No. 2572 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 9th September 1870, *reversing a decision of the Subordinate Judge of that District, dated the 28th June* 1870.

Doyaram Luskuree (Defendant) *Appellant,*

versus

Sookhanum (Plaintiff) *Respondent.*

Mr. Mun Mohun Ghose and *Baboo Romesh Chunder Mitter* for Appellant.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondent.

A member of a subsisting partnership is not in a position to sue his partner, still less one of his alleged partners, for the profits which had up to a particular time accrued; but he must, if he desires relief, sue in the ordinary way for an account.

Jackson, J.—We had taken time to consider this case; and a possible view of the case, taking the plaint in connection with some of the evidence given, was that the partnership between the plaintiff and defendant, if ever there was any, had come to an end, and that plaintiff was, consequently, suing to recover the amount due to him

* See case given as foot-note to the preceding page.

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after an adjustment of partnership accounts; but on questioning the pleaders to-day, they appear to consider that this was not the case as understood by the parties, but that the partnership alleged by the plaintiff was looked upon by him as still subsisting. That being the case,—and it seems to me consistent with the plaint and with the facts alleged,—I am of opinion that the plaintiff altogether mistook his remedy. Being member of a subsisting partnership, he was not in a position to sue his partner, still less one of his alleged partners, for the profits which had up to a particular time accrued; but he must, if he desires relief, sue in the ordinary way for an account.

That being so, I think it was not necessary to enter upon any questions of jurisdiction or otherwise, but that the suit ought to have been dismissed as being radically wrong.

On that ground, I think the special appeal must be allowed and the judgment of the Lower Appellate Court reversed, the plaintiff's suit being dismissed with costs.

Macpherson, J.—I am of the same opinion. I wish to point out, in case the plaintiff ever brings another action, that when parties sue, it is necessary for them to prove the case upon which they wish the Courts to act. In this particular case, there was no proper proof of the principal points which were at issue between the parties, and which the plaintiff ought to have proved. I may safely say that there is no possibility of the plaintiff succeeding in any other suit which he may think proper to bring hereafter, unless he comes into Court with reasonably good and full proof and lays it before the Court in an ordinarily business-like manner. If he ever does sue for an account, the first thing that he will have to prove will be the exact nature and extent of his alleged partnership. It is one thing to have a share in a screw house at Ghoosery, and quite another thing to have a 4 annas interest in a share which another man has as a partner in a business carried on at Ghoosery. I am far from saying that the plaintiff may not have a good cause of action against the defendant. But he will need before suing again to be very careful in ascertaining precisely what it is, looking at it from a strictly legal point of view. The suit as at present framed is wholly misconceived and wrong in form, and must be dismissed with costs. But it will not bar a suit for an account of the partnership.

The 11th July 1871.

Present :

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Hindoo Rajahs—Succession—Inheritance—Minors—Guardians—Suits.

Case No. 61 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 21st December 1869.

The Court of Wards on behalf of Raj Coomar Sheoraj Nundun Singh (one of the Defendants) *Appellants,*

versus

Raj Coomar Deo Nundun Singh (Plaintiff) and others (Defendants) *Respondents.*

The Advocate General for Appellant.

Mr. T. H. Cowie for Respondent.

There is no one rule of Hindoo law regulating the descent of all Hindoo Rajahs and their estates; but, in every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or *koolachar* must be proved.

In a suit in which it is not necessary for a minor defendant to take an active part, no guardian is ever justified in taking any step prejudicial to his ward. If he can do nothing positively for the minor's benefit, he ought to leave the matter to the Court.

Macpherson, J.—THE main question in this appeal is as to the position of the Rajah of Sheohur in Tirhoot.

The contention for the plaintiff (who appears as respondent before us) is that on the death of a Rajah of Sheohur, the estate passes to his heirs according to the ordinary law of inheritance prevailing among Hindoos in the Tirhoot district.

The contention for the defendant (appellant) is that the estate is impartible and passes with the Raj from Rajah to Rajah, the other members of the family being entitled to maintenance only.

The Court of Wards defends the suit, and now appeals to this Court, on behalf of Rajah Sheoraj Nundun, whom the plaintiff admits to be the present Rajah. Sheoraj Nundun is the plaintiff's nephew, being the elder son of the late Rajah Sheo Nundun, who was the plaintiff's elder brother.

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Sheo Nundun and the plaintiff were the two sons of Judoo Nundun, the younger brother of Rajah Rughoo Nundun on whose death the Raj passed to his nephew Sheo Nundun.

The plaintiff by his case in fact admits that he himself and his father Judoo Nundun were only "Baboos," *i. e.*, persons not entitled to the Raj, although standing in such a relation to a deceased Rajah that they rank among his immediate heirs according to the ordinary rules of the Hindoo Law of succession and inheritance.

While the plaintiff states in his plaint that the ordinary rules of Hindoo Law determine the line of succession and inheritance, so far as property is concerned in this family, he does not actually claim the full eight annas share to which, if that law be applicable, he would be entitled.

He asks for a six annas share only, having relinquished, he says, a two annas share in consideration of the position of his elder brother, the Rajah Sheo Nundun.

The case for the appellant is that the property belongs to the Raj and goes with it and is not susceptible of partition: and that there has obtained in this particular family, from time immemorial, a custom or *koolachar* according to which the Rajah for the time being appoints one competent member of the family to be his successor to the *guddee*, who, on the death of the person appointing him, becomes the *guddee nusheen* Rajah and takes the whole estate, the other members of the family being entitled merely to maintenance.

The lower Court decided in favor of the plaintiff holding that it lay upon the defendant to prove the custom or *koolachar* alleged, and that that *koolachar* had not been proved. The Subordinate Judge has written a very careful, and, in most material respects, excellent judgment. Concurring, as I do, in nearly all of the conclusions arrived at by the Subordinate Judge, who has gone at great length into the case, it is unnecessary that I should now go through the evidence in detail.

The Subordinate Judge shows, quite conclusively in my opinion, that the *koolachar* set up for the defence is not proved. There is certainly evidence to show that subsequent to the time of the permanent settlement the estate has not usually been dealt with according to the ordinary rules of inheritance and succession among Hindoos; but it is clear to my mind that it has not been uniformly (if ever) dealt with according to the principle relied on by the defendant.

The custom or *koolachar* pleaded may be treated as consisting of two distinct parts:—

1. A custom according to which the Rajah for the time being appoints one competent member of the family to succeed him on the *guddee* as Rajah: and

2. A custom according to which the entire property passes with the Raj from Rajah to Rajah, the other members of the family being entitled merely to maintenance.

It is as to this latter branch of the *koolachar* that the chief contest is in this suit; but the plaintiff also denies that the rule of succession to the Raj is as alleged.

The plaintiff practically admits that as a matter of fact the principal member for the time being of the family has for generations enjoyed the title of Rajah. In his plaint he states that he and "Rajah" Sheo Nundun were the two sons of "Baboo" Judoo Nundun deceased, and nephews of "Rajah" Rughoo Nundun, and grandsons of "Rajah" Dooshtodoomun: and that although he and his brother inherited the property, under the ordinary law, in equal shares, he (plaintiff) had relinquished a two annas share and contented himself with six annas only, on account of his brother Rajah Sheo Nundun's position. And when Sheo Nundun died, the plaintiff himself wrote immediately to the authorities giving notice of the fact and adding that before his death he had conferred the *Teeluk* and *Raj reasut* on his son Rajah Sheoraj Nundun (the defendant in this suit.)

On the evidence generally, too, there is no doubt that the principal member of the family has for many generations enjoyed the title of Rajah. It was not until the year 1859 that the title was formally and expressly granted by the British Government. In that year, Lord Canning formally conferred the titles of Rajah and Bahadoor on Sheo Nundun, who in the *sunnud* is addressed as "Rajah" Sheo Nundun, nephew of "Rajah Rughoo Nundun, deceased."

But while admitting that the principal member of the family, for the time being, enjoyed the title of Rajah, the plaintiff does not admit that the *koolachar* as to the succession to the *guddee* was such as is represented by the appellant. The *koolachar*

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pleaded is simply that the existing Rajah or *guddee nusheen* nominates a competent member of the family, and that the person nominated succeeds. The evidence on the record, however, does not prove that this is the *koolachar*. Under the circumstances, it is not necessary that I should determine in what precise manner the succession to the Raj, as independent of and separate from the property, has been regulated. If I had to determine it, I should probably declare that, whether competence ever properly entered into the question or not, the general rule was that the *guddee nusheen* (or whoever else had the power of appointing) nominated, and was bound to nominate, the eldest or other son, and failing son, the eldest or other nearest nephew. Mere competence clearly had little (if properly any thing) to do with it. The Rajah of Benares, who is a relative of the Sheohur family and who has been at times more or less mixed up in its affairs, was examined as a witness for the defence, and his evidence is much relied on by the appellant. But he speaks to a *koolachar* not such as is pleaded, but one simply by which the property would keep in the direct male line, the eldest son succeeding first, failing sons, the eldest nephew, and so on.

Moreover, we find that both the plaintiff and the defendant Sheoraj Nundun are obliged to make title through Rajah Dooshtodoomun, who neither was the direct male heir of the last preceding Rajah nor was nominated by him. Rajah Dooshtodoomun was nominated by the widow of Rajah Sreekishen, some considerable time after the death of the latter. Sreekishen died leaving Gunga Pershad his elder son, and Dooshtodoomun his second son. On Sreekishen's death, Gunga Pershad succeeded to the Raj and died shortly afterwards leaving two sons, Deen Dyal and Gowree Nath. Gunga Pershad apparently made no nomination of a successor. At any rate, when he died his sons were both of them passed over, and their uncle Dooshtodoomun took up the Raj. This he did under a letter of appointment from the widow of Sreekishen. In this letter the widow recites that on Sreekishen's death she had given the "teeluck" to his son Gunga Pershad to be Rajah. Then she says—"Gunga Pershad has since died and "his son has little sense and is unqualified. "Therefore, agreeably to the decision of my "relations, pundits, *punch* and neighbours, "old faithful servants, and other persons I "have given the *teeluck* of the Rajghee to "Rajah Dooshtodoomun, &c." This Dooshtodoomun it was who nominated and was succeeded by Rughoo Nundun, who nominated and was succeeded by Sheo Nundun, who nominated and was succeeded by the defendant Sheoraj Nundun. Gunga Pershad died about 1810: Doostodoomun about 1819; Rughoo Nundun in 1851: and Sheo Nundun in May 1867.

These facts as to the appointment of Doostodoomun to succeed to the Raj show that the succession did not go always, as alleged by the defendant, necessarily by nomination by the *guddee nusheen*: also that it did not invariably go in the manner indicated by the Rajah of Benares. Altogether, on the evidence, the greatest uncertainty exists as to any *koolachar* regulating the succession to the Raj.

There being this uncertainty as to so much of the alleged *koolachar* as relates to the right to succeed to the Raj, the case seems to me to be even more unfavorable to the appellant on the second branch of the alleged *koolachar*, as to the impartibility of the estate. In my opinion, it is proved distinctly that the estate is not impartible, but that, on the contrary, it has been frequently divided.

It is not disputed that a century ago, the estate as held by Guj Singh (through whom both parties claim) comprised the four pergunnahs, Majwa, Samraon, Mohesee and Babra.

Guj Singh had six sons, of whom (as the others died without issue) I need name only Doleep, Perthee, and Sutrajeet. His eldest son Doleep succeeded to the Raj: and Doleep was succeeded by his son Dhooroop. Dhooroop had no son, but had a great-grandson named Beer Kishore (the son of a son of a daughter of Dhooroop).

Rajah Sree Kishen, whom I have already mentioned, was son of Perthee (the second son of Guj Singh) and therefore was a first cousin of Dhooroop by whom he was appointed Rajah by a deed of gift dated apparently in 1199, F. (1782). In this deed of gift, I perhaps ought to mention, Dhooroop describes Sree Kishen as "my first cousin who would be entitled on my demise to succeed to the Raj *and property* under rightful title."

Sutrajeet, the third son of Guj Singh, had (amongst others) a son named Abdhoot.

The family standing thus, and the four pergunnahs Majwa, Samraon, Mohesee and Babra, having originally belonged to Guj

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Singh, we find that at the time of the permanent settlement, the two pergunnahs of Majwa and Samraon were settled with Beer Kishore, the great-grandson of Dhooroop, whose heirs are now known as the Bettiah Rajahs and still hold these two pergunnahs which were thus settled with Beer Kishore.

At the same time, the remaining two pergunnahs Mohesee and Babra were settled with Rajah Sree Kishen (son of Perthee) and Abdhoot (son of Sutrajeet) in shares of 8 annas each.

Nothing can show more conclusively than this that at the time of the permanent settlement the property was not treated as impartible. And the constant litigation which has gone on, I may say from that time to this,—carried on by various members of the family, claiming shares in the estate, and claiming them successfully,—shows that it never was accepted or acknowledged by the family as a body, although it may have been asserted, that the property was impartible and belonged to the Rajah alone. In addition to this, we have the fact, not denied by the appellant (and at any rate well proved) that the plaintiff acted jointly with his brother, the late Rajah Sheo Nundun, in the management of the affairs of the estate, his name appearing in leases, bonds, &c., exactly as if he were that which he says he was, a co-sharer with the Rajah.

It was contended that if it was proved that there had been a Raj of Sheohur for generations, it necessarily must be held that the property was impartible. But the mere fact that the principal member, for the time being, of the family has enjoyed the title of Rajah, does not necessarily lead to the conclusion that as a matter of law the property held by the Rajah is impartible and descends otherwise than according to the ordinary rules of Hindoo law. There is no authority for saying that it does. In every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or *koolachar* must be proved. There is no one rule that I know of which applies to all Hindoo Rajahs and their estates.

The evidence given by the numerous witnesses examined was gone into very fully by the Advocate General. But, looking at the whole case, I have no doubt whatever that the Subordinate Judge was right in holding that the plaintiff was entitled to a six annas share of the estate held by him and Sheo Nundun, and that it was not proved that the estate was impartible.

The letters and petitions written by the plaintiff immediately after the death of his brother Sheo Nundun have been pressed upon us as showing that at that time it had not occurred to the plaintiff to set up any claim, and as showing that he considered that the whole property passed with the Raj. In my opinion, the acts of the plaintiff show no more than this, that he wished his nephew Sheoraj Nundun to be acknowledged as Rajah in succession to his father, and that he wished himself to be acknowledged as his guardian during minority under an alleged appointment by Sheo Nundun. I do not see any thing whatever in his letters or conduct at that time to show that he deemed himself to have no share in these estates. It is true he does not claim any share expressly: and it is quite possible that if he had been recognized as guardian, so that things could have gone on pretty much as before, with the mere substitution of the name of Sheoraj Nundun for that of Sheo Nundun, no express claim and no dispute would ever have been heard of.

Then it is said that the suit should, in fact at any rate, have been dismissed, because the plaintiff merely seeks a declaration of title, alleging himself to be in possession. But there is nothing in this objection, as the Subordinate Judge has shown. This is no ordinary case of a purely declaratory suit. The Collector acting on behalf of the minor denies the plaintiff's title and has contested it in every possible manner in Court and out of it, and prevented him from collecting rent. Finally, he, in August 1868, wrote to him and bid him bring a suit to establish his right, if he had any. Under such circumstances, it scarcely lies in the mouth of the Collector to ask us to dismiss the suit as premature and unnecessary and informal.

The decree of the lower Court must no doubt be amended so far as it declares the value of the moveable property without having any evidence before it on the subject. If necessary, there ought to be a further inquiry as to the value (in detail) of the moveable property to a six annas share of which the plaintiff is entitled. I understood Mr. Cowie, however, to say that the plaintiff was content to have a mere declaration of his right to a six annas share, and did not insist on any specific declaration of value, or on a partition for the present.

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Unless the parties insist upon it we shall not order any further inquiry, but shall merely amend the decree by limiting it to a declaration of the plaintiff's right to a six annas share of the moveable property, *i. e.*, of the items admitted or specified in the decree, and of such other moveable property (if any) as there may be. The decree will not be altered as regards the immoveable property.

I see no reason why this amendment of the decree should affect the question of costs. The appeal really has been on the question of title,—the one important issue,—and the respondent is entitled to his full costs.

I observe that Roodraj Nundun, the younger brother of Sheoraj Nundun, was a defendant in this suit and appeared by his guardian. The guardian has chosen to put in a written statement supporting the defendant's case and alleging that "Baboos" have no interest in the estate beyond their right to maintenance. As Roodraj Nundun is himself only a "Baboo," it is clearly against the minor's interest that his guardian should file such a statement on his behalf. The guardian who filed such a statement, in fact committed a breach of duty towards her ward. If she did not choose to join actively with the plaintiff, she was at the least bound to have left the case in the hands of the Court and was not justified in adopting a line manifestly opposed to the interests which she was placed upon the record to defend. That the guardian of Roodraj happens also to be the mother of Sheoraj does not justify her or affect the question of her duties as guardian of the younger son. In a suit in which it is not necessary for a minor defendant to take an active part, no guardian is ever justified in taking any step prejudicial to his ward. If he can do nothing positively *for* the minor's benefit, he ought simply to leave the matter to the Court.

Jackson, J.—I concur in this judgment. I think it clear that the status of the family had none of the characteristics of a Raj and that the head of it became a Rajah in fact and truth for the first time when the title was conferred by Lord Canning, and I think the proof of the alleged *koolachar* quite failed.

I concur also in the observations made as to the proceedings of the guardian to the minor brother of the present Rajah.

The 11th July 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Landlord and tenant—Holding over—Cause of action.

Case No. 461 of 1871.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 13th February 1871, *affirming a decision of the Moonsiff of that District, dated the 16th December* 1870.

Kabeel Shaha (one of the Defendants) *Appellant,*

versus

Radha Kissen Moulick and another (Plaintiffs) *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Sreenath Dass for Respondents.

The mere fact of a landlord permitting a tenant to hold over for a year beyond the term of his lease cannot create any right of occupancy in the tenant's favor: the landlord's cause of action in such a case arises when he is refused the right to re-enter.

Bayley, J.—We think this special appeal must be dismissed with costs.

The suit was for ejectment of the defendant on the ground that the term of the lease had expired, and the objection of the defendant as taken in this special appeal and argued before us is that the suit is barred by limitation.

It is admitted that the original lease was for 5 years from 1270 to 1274, both inclusive, and it is also admitted that the defendant has held over for a year or more after the expiry of the above term; but it is contended that as more than a year was allowed to elapse before the plaintiff brought any suit, the suit is barred. Now, considering the not very distinct provisions of Section 27 of Act VIII of 1869, B. C., there may be some little difficulty in the case, but it is clear that in a case like this where the landlord shews his wish that the tenant should not quit his land as soon as the term of his lease is over by allowing him to continue on the land holding over, the landlord's cause

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of action must be taken to be the date when the landlord is refused the right to re-enter.

In this view, I think that the suit is not out of time and that this special appeal must be dismissed with costs.

Mitter, J.—I concur. It is not pretended that the appellant has acquired any right of occupancy in the land, and the mere fact of the landlord having permitted him to hold over for a year cannot possibly create any right of occupancy in his favor. Under such circumstances, the real cause of action must be presumed to have arisen when the landlord wanted to take possession of the land, and he resisted.

The 11th July 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Leasehold estates—Devolution—Kubooleut—Pottah.

Case No. 383 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 3rd February 1871, *affirming a decision of the Moonsiff of Arrariah, dated the 18th November* 1870.

Shaikh Danoollah (one of the Defendants) *Appellant,*

versus

Shaikh Amanutoollah and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Any leasehold estate, when not expressly limited to the life of the lessee, passes to his heirs in the same way as other property, and if the heirs take the estate of the deceased lessee they take it with all rights and responsibilities.

The absence of a pottah in writing cannot of itself release the zemindar from the conditions of the agreement entered into with the tenant as established by the written kubooleut.

Ainslie, J.—THE plaintiff obtained a pottah from the zemindar for certain lands on the 27th Bysack 1275, Moolkee, and alleges that almost immediately after his entering into possession the defendant forcibly ousted him: he now claims possession and mesne profits.

The defendant alleges that the lands were previously leased to him. His statements as to the mode in which he acquired title were very inconsistent, but in the end he summoned the zemindar to produce his kubooleut, or rather his son's kubooleut, for the authority under which he claims to hold, which is styled a *purwanagee*, and the kubooleut corresponding thereto, are in the name of his deceased son Elahee Buksh. The kubooleut produced by the zemindar is for a term of five years from 1273 to 1277. Elahee Buksh appears to have died before the date of the lease to the plaintiff, but the date of his death does not appear on the record.

It is contended for the special respondent that there was no covenant between the defendant and the zemindar on which either can sue the other, and that even if it be held that the kubooleut is to be taken as defining the terms of the lease granted to Elahee Buksh, there are no words to show that the tenure was capable of being inherited. Passages in the judgment of the Privy Council in Dhunput Singh's case, IX Weekly Reporter, Privy Council, 3, were relied on by Mr. Gregory.

These passages, however, have no bearing on the present case. Their Lordships were considering the question of the creation of a *perpetual hereditary tenure*, and there is nothing in their remarks which applies to the question now raised, namely, whether a lease for a term continues for the specified term to the heirs of the lessee dying within the terms, or whether, in the absence of specific provisions to the contrary, it terminates with his life.

It is said that there is no decision on the point to serve as a precedent.

We think that any leasehold estate, when not expressly limited to the life of the

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lessee, passes to his heirs in the same way that any other property belonging to him devolves on them, and that if the heirs take the estate of the deceased lessee, they take it with all the rights and responsibilities attaching to it; and it is only in case of their refusal to accept the inheritance that the engagements entered into by the deceased cease to operate from the date of his death.

It has been contended that Elahee Buksh never obtained a lease and that the paper called a *purwanagee* cannot be treated as one, or at most can only be taken as a lease from year to year; but when we find that the zemindar took a kubooleut or counterpart for a specified term, we must hold that the lease was for that term, and the absence of a pottah in writing corresponding to the kubooleut cannot of itself operate to release the zemindar from the conditions of the agreement entered into with his tenant which are established by the written kubooleut.

We, therefore, decree this appeal and dismiss the plaintiff's suit with costs in all Courts.

The 13th July 1871.

Present:

The Hon'ble L. S. Jackson and G. C. Paul, *Judges.*

Interest—Balance of accounts.

Case No. 460 of 1871.

Special Appeal from a decision passed by the Officiating Additional Judge of Shahabad, dated the 23rd January 1871, *reversing a decision of the Sudder Moonsiff of that District, dated the 9th September* 1870.

Joy Narain Bhuggut (one of the Defendants) *Appellant,*

versus

Kashee Chowdhry (Plaintiff) *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Mr. R. E. Twidale for Respondent.

In a suit relating to balance of accounts, probabilities are not sufficient to support a decree for interest in the absence of a contract for interest.

Jackson, J.—This suit relates to balance of accounts.

The Moonsiff found that there was no contract proved as to interest, and he also found that the amount repaid by the defendant corresponded almost exactly with the principal amount borrowed: on these grounds he refused to allow interest.

The Additional Judge, on appeal, considers this reasoning to be weak. He observes that as the plaintiff was a money-lender, he must be supposed to have lent money upon interest, and he then observes that the account-books show money to have been charged as interest, and he thinks that these circumstances threw it upon the defendant to have objected if he did not wish to pay interest, and to have closed his account.

These reasons of the Additional Judge are not sufficient to support a decree for interest in the absence of evidence of any contract for interest.

It is said that there was evidence of an agreement for interest, and that as the Judge has not come to a finding upon that evidence we ought to remand the case to him in order that he should come to a finding upon it.

It appears to us, however, that if the Judge thought the evidence adduced upon that point sufficient to ground his decision upon, he would not have resorted to probabilities and based his conclusions upon them. There is nothing very improbable in the supposition that the plaintiff having lent money to his debtor (which it appears he did out of the ordinary course of things without taking *sur-khut* or *hath-chitta*) should do so without interest.

Under these circumstances, the decision of the Judge cannot stand; and as the plaintiff, who, it seems, was called upon to give evidence in this case, did not think fit to pledge his oath to the fact that there was a contract for interest, and considering that the defendant is not the borrower but the representative of the borrower, we think it is unnecessary to order a remand in this case, but direct that the judgment of the first Court be restored with costs.

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The 13th July 1871.

Present:

The Hon'ble L. S. Jackson and G. C. Paul, *Judges.*

Revenue-paying estates—Attachment—Notice of sale.

Case No. 427 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th February 1871, *affirming a decision of the first Subordinate Judge of that District, dated the 8th September* 1870.

Zerkalee Kooer (one of the Defendants) *Appellant,*

versus

Lalla Doorga Pershad (Plaintiff) and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

An execution-creditor attaching an estate paying revenue to Government is not obliged to insert in the notice of sale the names of all appurtenances, such as *aslee* and *dakhilee* mouzahs.

Jackson, J.—THE argument of Baboo Unnoda Pershad Banerjee, who appeared for the respondent, in so very clear a case as this is no doubt justified by the fact that he has the judgment of the two lower Courts in his favor, but we are not the less bound to say, as we have no hesitation in saying, that the judgments of those Courts is erroneous.

The defendant clearly intended to sell the estate known by the name of Pipra. He complied with the requisitions of the law by stating in the notification of sale the name of the property, and the revenue assessed upon it, which is the revenue assessed upon the entire estate of Pipra, therein being included one *aslee* and four *dakhilee mouzahs*, which latter the plaintiffs are now claiming. The circumstance that a given estate paying revenue to Government includes in it *dakhilee mouzahs* or appurtenances does not oblige the execution-creditor to insert in the notice the names of all those appurtenances, and the fact that the property was described by its ordinary name with the full Government revenue affixed to it shows beyond dispute what it was that was attached and sold. The subsequent so-called sale on the part of the plaintiff, who purchased in his own execution, seems to have been a merely speculative move by which however the plaintiff is not entitled to take anything.

The defendants manifestly purchased the whole of the property and are consequently entitled to retain possession of it. The judgment of the Court below will be reversed and the plaintiff's suit dismissed with costs.

Paul, J.—I concur.

The 13th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 30 Act VIII (B. C.) 1869—Limitation—Fraudulent Accounts.

In the matter of

Jan Ali Chowdhry (Plaintiff) *Petitioner,*

versus

Ishan Chunder Sein and others (Defendants) *Opposite Party.*

Mr. M. L. Sandel for Petitioner.

No one for Opposite Party.

A suit under Section 30 Act VIII (B. C.) of 1869 against a gomashta to obtain accounts, after the agency has determined, must be brought within a year from such determination.

The proviso in that Section refers to suits for money; and under that proviso, where a fraudulent account has been given in by the agent, concealing the fact of the receipt of certain monies, the zemindar has one year from the discovery of the fraud to bring his suit for such money.

Jackson, J.—THE question before the Lower Appellate Court was whether this suit was barred by limitation. It was a suit under Section 30 Act VIII of 1869, B. C., against a gomashta to obtain from him certain accounts. It appears that a number of other people were also mixed up in the case as defendants. But it is said here that they

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are not made respondents in this appeal, and that they have no longer any thing to do with the case.

The Judge has found that the suit is barred by limitation, because it was not instituted till 1232, though the papers demanded were for 7 years previous to 1229, and because there was no evidence to prove that the agency continued after the year 1229. The suit was, therefore, not brought within one year from the determination of the agency, and the Judge held that the suit was barred by limitation.

Before us it is said that the case comes within the proviso in the second sentence in Section 30 of the above Act. There is a great difficulty in ascertaining what the suit really is. But it appears to be admitted that in 1231, that is, two years after the determination of the agency, the defendant of his own accord gave in his accounts. It is said that these accounts were not as full and specific as they ought to be, and that they did not distinctly show the whole of the collections and receipts, and therefore the plaintiff now has a right to sue within one year of the receipt of those accounts, in order to obtain proper accounts.

It seems to us that the proviso in Section 30 refers to suits for money; and it says distinctly:—"Provided that if the person "having the right to sue shall, by means of "fraud, have been kept from the knowledge of "the receipt of *any such money* by the agent, "or if any fraudulent account shall have "been rendered by the agent, the suit may "be brought within one year from the time "when the fraud shall have been first known "to such person."

The words "any such money" clearly show that this proviso alludes to suits for money. If a fraudulent account has been given in by the agent, it is very probable that the zemindar would be ignorant that certain monies had been collected which the agent might have collected. He will under the proviso obtain one year from the time he discovers the fraud in order to bring his suit for such money.

We think the Judge is quite right on the point of limitation. Under Section 30 Act VIII of 1869, B. C., the plaintiff is too late to sue for papers, and that limitation does bar the plaintiff's claim.

We reject this appeal.

The 13th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Mistake by Lower Appellate Court—Special Appeal—Review.

In the matter of

J. P. Wise (Defendant) *Appellant,*

versus

Huro Lall Giree Gossain (Plaintiff) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

No one for Respondent.

Where there is an omission on the part of the Lower Appellate Court to try any point from mistake, the non-decision of such point is not a ground for special appeal, but for review. If the Judge refuses to admit a review in such a case, an application to the High Court may be made.

Jackson, J.—THE only points in this case upon which we think there is any ground for special appeal are two, upon which it is said that the appeal was urged before the Judge, but upon which the Judge has passed no decision. The first ground is as to whether the defendant was bound to pay rent for a certain small plot of land about one khadah in extent, which was found by the Ameen to be in the possession of one Juggut Chunder Roy. The first Court gave a decree for rent of this land against the defendant on the ground that whether it was in Juggut Chunder Roy's possession or not, he being in the employ of the defendant the defendant was bound to pay rent.

There is a ground on this point in the memorandum of appeal on the part of the defendant, and in the decision of the Judge

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there is a mention that this was one of the grounds before him, but in his judgment there is no decision upon it whatever.

The second point is that the first Court gave a decree to the plaintiff for arrears of rent, with interest accruing annually on those arrears, as well as interest on the total sum due up to the date of the decree and afterwards. One of the grounds of appeal before the Judge was that this interest should not be calculated on each year's arrear of rent. The Judge mentions this as having been one of the grounds of appeal before him in his judgment, but he gives no decision upon it. *Primâ facie*, then, looking to the Judge's judgment, it appears that if those two points were brought to his notice as having been points upon which on appeal before him the decision of the lower Court was objected to, the Judge has omitted to give any decision upon them. Whether these points were actually urged before the Judge or not, as the Judge omitted the decide those points, the appellant's vakeels should, we think, have put in an application for review to the Judge and should have asked him to decide those points if they were material to their case, and they are bound, we think, to take that course now before coming up to this Court on special appeal. If it is the case that the Judge will refuse to decide these points, then there is a very good ground for coming up to us on special appeal. But if the omission has been the result of a mistake either on the part of the Judge or on the part of the vakeels for the appellant, that mistake can best be rectified by an application to the Judge. If we admit this special appeal now, no application for a review can be filed before the Judge. If, however, we do not admit this special appeal application, there is no legal bar to the presenting of an application for review to the Judge.

It is said that three months have expired and the application will not be entertained without just and reasonable cause to the satisfaction of the Court. But the reason how these three months have been allowed to expire, is patent, *viz.*, the mistake of the appellant's vakeels in thinking that the proper course is to come up to us on special appeal. There seems to be some disinclination in the lower Courts to apply to the Judge for a review. But these applications to us ought not to be admitted on any such disinclination, where the proper course is to apply to the Judge for a review. Where there is a decision on any point, and that decision is wrong on any point of law, then a special appeal lies to this Court. Where a Judge refuses to try a point which he ought to try and which was urged before him, that will be a very good ground for coming up to us on special appeal. But where there is an omission to try any point from mistake, the non-decision on that point forms no good ground for coming to this Court on special appeal. We think that our proper course is to order, as we have already ordered, in several other cases, namely, for the present to refuse to admit this application for the admission of special appeal, and to direct the appellant to take a copy of this judgment and to file it with the application for a review to the Judge. This application can be retained in this Court, and if the Judge refuses to admit the review the party will be entitled to renew this application.

The 13th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Lease—Days of Grace.

Case No. 326 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 19th September 1870, modifying a decision of the Sudder Moonsiff of that District, dated the 22nd July 1870.

Madhub Chunder Adit Chowdhry (Defendant) *Appellant,*

versus

Ram Kaloo Beeparee (Plaintiff) *Respondent.*

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Baboo Woomesh Chunder Banerjee for Appellant.

Baboos Kallee Mohun Doss and *Nullit Chunder Sein* for Respondent.

The 15 days' grace allowed to a lessee prior to ejectment cannot be negatived by any condition in the lease.

Jackson, J.—THIS case must be remanded to the Subordinate Judge. His decision is extremely short: there is nothing upon it to show that he has in any way considered the evidence of the numerous witnesses who gave evidence on behalf of the defendant to prove the fact of payment at different times. The Subordinate Judge must consider on the evidence of these witnesses whether the *pouch-puttro* is attested or not and whether that document is stamped or not. In reality, the question as to whether this money has been paid must depend on the oral evidence. The Subordinate Judge's decision should show on the face of it that he had considered all the evidence in the case. As far as the decision in this case shows, it would appear that because the *pouch-puttro* was not stamped, he has not gone into the evidence at all.

The first Court, although it gave a decree against the defendant for arrears of rent, gave the defendant 15 days grace for payment of arrears before directing that he should be ejected as prayed for in the plaint.

But the Subordinate Judge has set aside the order as regards 15 days grace upon the ground that it is contrary to the conditions of the lease. But it is admitted before us that there is no such condition in the lease at all. But even if there be such a condition in the lease, and that condition is contrary to law, the condition of the lease must give way to what has been declared to be the law. If, therefore, the Subordinate Judge is of opinion that arrears of rent are due from the defendant, he will give him 15 days grace, as required by the law, before allowing the plaintiff to eject the defendant.

Costs of this appeal will form costs of the suit and will abide the final result.

The 14th July 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Stamps.

Regular Appeal No. 145 of 1871.

Ranee Khajooroonissa and another (Defendants) *Appellants,*

versus

Mussamut Rohimoonissa and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale for Appellants.

No one for Respondents.

When a stamp of the full value is available, parties ought to use as small a number of stamps as they can.

Note by the Deputy Registrar.—I BEG the Court's attention to the mode in which the Court fees are now paid in,—this instance offering a good sample of what is done in most of the cases filed.

The amount indicated by the value of this appeal as the Court fee chargeable is 475 rupees which has been paid by 11 stamps, *viz.*:—

8 of rupees 50 each ... Rs. 400.
3 of rupees 25 each ... „ 75.

Doubts have been raised as to whether parties should not be required to revert to the practice which prevailed under the old law of paying the Court fee by one stamp of the full value (vide Circular Order No. 148 of 12th August 1859), or at all events when no paper of the required value exists or is procurable, to use as small a number of stamps as possible, one of the stamps so used approaching most nearly to the value required.

It is besides inconvenient to burthen the appeal records with such numerous stamps, and I therefore request some definite orders.

The Western Court has issued a Circular Order on the point to which I beg reference, *viz.*, No. 8 of 10th September 1867.

Bayley, J.—Where one stamp of the full value is not procurable in Court, the parties cannot help putting in separate pieces of stamps of smaller value; but when such stamp is available in Court, we think the parties ought to use as small a number of stamps as they can.

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The 14th July 1871.

Present :

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Stamps.

Regular Appeal No. 146 of 1871.

Mirza Dawd Ali and others (Plaintiffs) *Appellants,*

versus

Syud Nadir Hossein (Defendant) *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

No one for Respondent.

There is no illegality in making up the stamp fee chargeable in an appeal by means of any number of stamps of smaller values.

Note by the Deputy Registrar.—I BEG the Court's attention to the mode in which the Court fees are now paid in ; this instance offering a good sample of what is done in most of the cases filed.

The amount indicated by the value of this appeal as the Court fee chargeable, is 1,250 rupees which has been paid by 26 stamps, *viz.*

2 of rupees 25 each ...Rs 50.
24 of rupees 50 each ...Rs 1,200.

Doubts have been raised as to whether parties should not be required to revert to the practice which prevailed under the old law of paying the Court fee by one stamp of the full value (vide Circular Order No. 148 of 12th August 1859) or at all events when no paper of the required value exists, or is procurable, to use as small a number of stamps as possible, one of the stamps so used approching most nearly to the value required.

It is besides inconvenient to burthen the appeal records with such numerous stamps, and I therefore request some definite orders.

The Western Court has issued a Circular Order on the point to which I beg reference, *viz.*, No. 8 of 10th September 1867.

Ainslie, J.—We are of opinion that there is no illegality in the mode of making up the stamp fee chargeable in this appeal. The ruling of the late Chief Justice Sir Barnes Peacock. reported at page 449, Volume XII of the Weekly Reporter, has already disposed of the question.

Section 27 Clause 6 of the Court Fees' Act gives the local Government power to regulate the number of stamps to be used for denoting any fee chargeable under the Act, but no rule on the subject has been published. It is not the duty of the Court to move the Government in the matter.

The 15th July 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, *Judge.*

Under-tenant — Notice of enhancement—Sections 7 and 9 Regulation VII of 1822 — Section 13 Act X of 1859.

Case No. 49 of 1871.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 21st December 1870, modifying a decision of the Subordinate Judge of that District, dated the 22nd August 1870.

Mr. J. P. D'Silva (Plaintiff) *Appellant,*

versus

Raj Coomar Dutt and others (Defendants) *Respondents.*

Baboos Rash Beharee Ghose and *Romesh Chunder Mitter* for Appellant.

Mr. J. S. Rochfort and *Baboo Doorga Doss Dutt* for Respondents.

Where an under-tenant holding or cultivating land under the conditions mentioned in Section 13 Act X of 1859, enters into no fresh engagement at the time of re-settlement, he has a right to receive a written notice before he can be called upon to pay enhanced rent, the provisions of that Section qualifying those of Sections 7 and 9 Regulation VII of 1822.

Norman, C. J.—THIS was a suit for rupees 1,783-8-9, as the rent of certain land called an ousut talock in the Soonderbunds, at the rate of 12 annas per beegah.

The facts, as stated in the judgment of the Judge of Backergunge, are as follows :—

The plaintiff is the lessee under Government of a jungleboore talook in the Soonderbunds of which Mouzah Charoon is a portion.

The defendants hold that mouzah, which they sub-let to ryots. The plaintiff calls them ousut talookdars.

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In 1869, the talook was re-settled by the Commissioner of the Soonderbunds. The defendants on the 23rd of February 1869 presented a petition to the Commissioner asking him to settle Mouzah Charooa with them at 12 annas a beegah, being 4 annas per beegah more than they had previously paid as rent. The Commissioner did not accept their offer, but settled the whole talook with the plaintiff at the proposed rate of 12 annas. He recorded the defendants in his jumma-bundee on the 1st of March 1869 as izahari ousut talookdars at a rent of rupees 1,783-8-9. The defendants did not sign this jumma-bundee nor did they agree to it. On the contrary they objected, and it appears that they are now seeking to set aside the Commissioner's order of the 1st of March 1869.

The plaintiff sues the defendants for the rent of 1276 (1869-70) at rupees 1,783-8-9, claiming this rent on the ground that the defendants agreed to it by their petition of the 23rd of February addressed to the Commissioner of the Soonderbunds. The defendants, on the other hand, contended that they never agreed to pay this rent to the plaintiff; that they cannot be made liable to pay more than the rent formerly paid by them, *viz.*, rupees 1,189, until they have been regularly served with a notice of enhancement as required by Act VIII of 1869, B. C. The Judge says that in his opinion no under-tenant such as is described in Act X of 1859, Section 18, and Act VIII of 1869, B. C., Section 14, is liable to pay rent at an enhanced rate until after service of a notice.

He refers to a case decided by Mr. Justice Bayley and Mr. Justice E. Jackson, VI Weekly Reporter, page 5.

He considers that the defendant's offer to pay rupees 1,783-8-9 to the Government, if a settlement should be concluded with them, does not bind them to pay that rent to the plaintiff with whom the settlement was in fact concluded, and accordingly, modifying the decision of the Subordinate Judge, he decrees to the plaintiff rupees 1,189, or, in other words, rent at the old rate of 8 annas per beegah. From this decision the plaintiff has appealed.

His vakeel referred us to a case decided by Mr. Justice Loch and Mr. Justice Paul, XIV Weekly Reporter, 471, a case somewhat similar to the present, in which it is said that no notice of enhancement under Act X was necessary.

This, no doubt, may be so when the ryots at the time of the re-assessment accept pottahs from the Collector or bind themselves by signing and agreeing to the jummabundee. But with regard to cases where the under-tenant enters into no fresh engagement at the time of the re-settlement, we must observe that the language of Section 13 of Act X of 1859 is perfectly general. Its terms are wide enough to secure to every under-tenant holding or cultivating land under the conditions therein mentioned, a right to receive a written notice containing certain particulars before he can be called on to pay any higher rent for such land than the rent paid during the preceding year. Whatever, therefore, might have been the effect of a re-settlement and re-assessment under Section 7 of Regulation VII of 1822 and of the record of the Collector made at the time of such re-settlement under Section 9 of the same Regulation, with reference to the rights of under-tenants before the passing of Act X of 1859, we think that the provisions of Sections 7 and 9 of Regulation VII of 1822 must now be read as qualified by Section 13 of Act X of 1859.

The decision of the Judge on both points is, in our opinion, correct, and the appeal is therefore dismissed with costs.

Loch, J.—I concur. I think the settlement officer in this case has neglected to attend to the instructions of the Board of Revenue which are to the effect that if on revising a settlement an enhancement of rent be determined upon, care should be taken to secure the signatures of the ryots to the newly formed assessment, so that if any of the tenants refuse or omit to sign the jummabundee, notice may be served upon them as prescribed by the provisions of Section 13 Act X of 1859. The Board of Revenue has, therefore, clearly recognized the necessity of notices being served on tenants who do not agree to the revised jummabundee by which they are made liable to payment of rents at enhanced rates, and the first Court should not, in the absence of any such notice, have given plaintiff a decree for the rent he claimed in this suit. The petition put in by the defendants offering to pay 12 annas a beegah provided the settlement were made with them was not a consent to the new jummabundee prepared by the settlement officers. On further consideration of the subject, I think we laid down the rule in our decision reported at XIV Weekly Reporter, page 471, without sufficient regard to the provisions of Section 13 Act X of 1859.

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The 15th July 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Auction-purchaser — Possession — Right of action.

Case No. 294 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 15th December 1870, reversing a decision of the Subordinate Judge of that District, dated the 16th August 1870.

Ram Chunder Paul and another (Plaintiffs) *Appellants,*

versus

Omra Churn Deb (Defendant) *Respondent.*

Baboos Kalee Mohun Doss and *Deorga Mohun Doss* for Appellants.

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Romesh Chunder Bose* for Respondent.

The auction-purchaser of a talook seeking to obtain possession against the former proprietors, many of whom are cultivators holding separate possession of specific portions and having their houses on the land, must sue them specially for those portions to which they lay claim. He cannot sue the whole community in the aggregate for all the lands of the village.

Jackson, J.—THERE is no ground whatever for interfering with the orders passed by the Judge in this case, but we think that the decree passed by the Subordinate Judge against the remaining 134 defendants who did not appeal to the Judge cannot be allowed to stand. The plaintiff is the auction-purchaser of talook No. 203. The defendants are many of them the former proprietors of that talook, and others are said to be in league with the former proprietors or residents on the land. The cause of action against them is that they will not allow the plaintiff to obtain possession of his purchased talook, and that they have combined together to prevent his obtaining possession. One portion of the defence of some of the defendants is that the lands of talook No. 203 are identical with some portions of the lands of talook No. 202. The general defence is that they claim no right to the lands of talook No. 203 and that they have not prevented the plaintiff obtaining possession, but that they are not obliged to leave their houses and fields because the plaintiff has purchased the talook. It seems to be the case of a talook where many of the former proprietors were themselves the cultivators of the soil, holding separate possession of specific portions of land and having their houses on the land.

The Subordinate Judge has found that the defendants are combined in a league to keep the plaintiff out of possession; that they have not left their fields and houses since plaintiff obtained an order for possession. The question of law whether one suit could lie against all the defendants was raised before him, but the Subordinate Judge held that it could, and he finally gave the plaintiff not only a general decree for possession but also for mesne profits against all the defendants from the date of purchase to the date plaintiff obtained possession in execution.

We think that such a decree is wholly illegal, and that we should not be performing our duty if we allowed it to stand. If it is the case that certain of the defendants are keeping the plaintiff out of possession of portions of the estate which they are retaining in their own possession, the plaintiff must sue those defendants specially for those portions of the land to which they lay claim. He cannot lump the whole community of the village in one suit for all the lands of the village. As the decree has been passed each defendant is liable for mesne profits of all the lands in the village, whether he has been occupying them or not, and whether he has any claim to them or not. Such a decree is wholly illegal and must be set aside. If the defendants are leagued to oppose the plaintiff's possession by force, the plaintiff should apply to the Magistrate. If the defendants will not give the plaintiff kuboolents, as the plaintiff asserts, and by which assertion he admits their rights to keep possession of the land, the plaintiff can sue them for kuboolents. But the suit as here conceived is utterly illegal. We reverse the Subordinate Judge's decree *in toto*, and as regards the special appeal to this Court we dismiss it with all costs.

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The 15th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Accounts — Stamp — Damages — Declaratory suit — Court Fees' Act, 1870.

Case No. 240 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 14th September 1870.

Ram Doollal Singh (Defendant) *Appellant,*

versus

Gopal Kristo Singh (Plaintiff) *Respondent.*

Mr. J. W. Lowe and *Baboo Rash Beharee Ghose* for Appellant.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondent.

A suit in which plaintiff seeks an account of hi father's estate from the executor appointed under his father's will, and in which he claims damages to the extent of 35,000 rupees, in default of his obtaining the accounts, should be filed on the stamp required for a suit for the recovery of 35,000 rupees, and not on a stamp of 10 rupees which, under Clause 3, Section 17, Schedule II of the Court Fees' Act, 1870, is the stamp laid down for a declaratory suit in which no consequential relief is sought and which cannot be valued.

Jackson, J.—THE plaintiff and defendant in this suit are brothers, the sons of one Tiluck Chunder Singh. The cause of action is connected with the will of their father. By this he declared that his three sons shall be his heirs and directed that the defendant Ram Doollal Singh shall be the sole manager of the ancestral estates during Ram Doollal's lifetime, paying certain annual amounts to each of the three sons and a fixed stipend to the widow of his father, and investing the balance in landed property for the benefit of the family. The will goes into numerous details connected with the management of the property by the defendant, and although in one clause it lays down that the defendant shall keep and make known to the other heirs certain accounts of his management, it in another clause directed that no suit for an account shall be made, and if such a claim was preferred it should be dismissed.

The plaintiff in his plaint states that he entertained some objections to this will, and when the defendant applied to the Civil Court for a certificate of administration to his father's property under the will he raised objections to the grant of such certificate. But upon the defendant entering into an agreement with him to give him an annual account of his management, he, the plaintiff, withdrew from those objections. The plaintiff adds that although seven years have elapsed, the defendant has never furnished him with any account, and that except from such account he has no other means of ascertaining the amount of the profits of the estate or the manner in which those profits are expended by the defendant and what is the balance at credit of the family. He also alleges that the defendant has been wasting and using the money of the estate for his own private purposes; and therefore he sues for an account of the ancestral estate under the defendant's management for the past seven years.

The defendant denies the allegations of waste and mismanagement, admits the execution of the agreement alluded to by the plaintiff, but asserts that he did not agree thereby to render any further account of the estate than the will enjoined him to render, and added that he had always acted in accordance with the terms and conditions of the will. The defendant also urged that the suit having been valued by the plaintiff at the amount of rupees 35,000, the injury which plaintiff calculated he sustained by the withholding by the defendant of the accounts was improperly brought upon a ten rupees stamp. The defendant also pleaded that limitation barred the plaintiff's claim for a seven years' account.

The Subordinate Judge of Tipperah held that on the will and agreement entered into between the parties, the defendant was bound to render to the plaintiff an account of his management of the estate, and being of opinion that the defendant's pleas were untenable he decreed that the defendant shall render to the plaintiff the accounts claimed, or pay to the plaintiff rupees 35,000, or be imprisoned for two years.

This appeal is preferred from this decree, and it was urged before us that the agreement did not extend beyond the provisions of the will, and that under the will no suit for an account could be brought, and therefore the plaintiff's suit should be wholly dismissed.

The will in this case with all it numerous provisions is somewhat peculiar * * * * * * * * * * * *

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With reference to the contention that this suit has been improperly valued, we are of opinion that as the plaintiff alleged in his plaint that if he did not obtain these accounts, he was likely to be endamaged to the extent of rupees 35,000, he acted illegally in presenting his plaint on a stamp of 10 rupees. This stamp is laid down only for a declaratory suit which cannot be valued. The plaintiff put a valuation on his present suit, and he should have stamped his plaint accordingly.

The plaintiff has not in his plaint explained how he has allowed seven years to elapse without at any time either suing for these accounts or even applying for them. It is proved on the record that accounts were furnished to the younger brother on his attaining his majority, and the receipt then given for the accounts show that they were given under the agreement with the plaintiff, though the younger brother was no party to it. It seems improbable under such circumstances that the defendant would not also furnish the plaintiff with accounts, if he had required them of the defendant. The plaintiff has not offered his own evidence of any application for accounts or any refusal by the defendant. We think, therefore, that no decree should pass directing the defendant to furnish the plaintiff with accounts. But the decree should be for a declaratory order such as would be covered by the stamp on which this plaint was filed that the plaintiff is entitled to obtain accounts of the management of the family estate from the defendant, and that the defendant is bound to furnish him with a copy of such accounts.

We set aside so much of the order of the lower Court as directs the defendant to furnish the accounts for the past seven years, and that most incomprehensible portion of the Subordinate Judge's decree which directs that if accounts are not rendered, the defendant shall pay the plaintiff 35,000 rupees or be imprisoned for two years. Each party should, we think, pay his own costs of this litigation.

Mookerjee, J.— * * *
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It is, however, clear that the Subordinate Judge is wrong in his view of the Court Fees' Act, Act VII of 1870. Clause III, Section 17, Schedule II of that Act, requires that the plaint should be engrossed on a stamp of 10 rupees if the prayer of the plaintiff is simply to obtain a declaratory decree without any consequential relief. In this case, the plaintiff prays that a decree for rupees 35,000 be passed in his favor if the defendant fail to render the account for which the suit is brought. The Subordinate Judge also gives a decree for rupees 35,000 as consequential relief to the plaintiff. He was, therefore, clearly wrong in allowing the plaintiff to sue on payment of a stamp duty of only rupees 10.

The plaint distinctly prays that a certain sum of money be allowed to him as damages if the defendant refuse to render the account which he has bound himself to furnish to the plaintiff. The value of the stamp should have been according to the amount asked for as damages, namely, the stamp required by law for a suit for the recovery of rupees 35,000. The Subordinate Judge when admitting the plaint admitted it on a stamp of rupees 10, because he considered the suit was a declaratory suit, in which "it is not possible to estimate at a money value the subject matter in dispute," but when deciding that suit he decrees that the "defendant shall "deliver the statement of accounts or pay "the plaintiff rupees 35,000 or be imprisoned for 2 years."

The Subordinate Judge should have seen that the plaint does not simply ask for a declaration to the effect that he is entitled to get an account of the estate from the manager, but distinctly prays that on the refusal of the defendant a sum of rupees 35,000 be awarded to him. This is not a declaratory suit, but a suit in which "money value" has been given to the claim, and the Court is asked to award a certain definite sum as damages to the plaintiff.

In the plaint, however, it is not alleged that the plaintiff ever asked the defendant to render an account to him. There is also no evidence in the record to prove any demand on the part of the plaintiff for the accounts, nor is it shewn that the defendant ever denied the right of the plaintiff to get an account before the institution of this suit. The suit is also brought after seven years from the date of the testator for the accounts of the entire period from that date to the present time. It is likewise brought on a stamp which would merely cover a suit for a declaratory decree.

Under all these circumstances, I think that the plaintiff is entitled only to a declaration from the Court that under the will

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of Tilluck Chunder and the agreement executed by the defendant in favor of the plaintiff, the plaintiff is entitled to demand an account and has a right to compel the defendant to render to him annually an account of the estate under his signature.

The decree of the Subordinate Judge awarding rupees 35,000 to the plaintiff will be set aside and a simple declaratory decree is all that should be entered in lieu thereof.

Each party will pay his own costs in both the Courts.

The 17th July 1871.

Present :

The Hon'ble L. S. Jackson and G. C. Paul, *Judges.*

Eviction—Rights of landlord—Middlemen—Under-tenants.

Case No. 180 of 1870.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 10th May 1869.

Lalla Joynath Sahee Deo and another (Plaintiffs) *Appellants,*

versus

Lutchun Christian and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Romesh Chunder Mitter* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

In a suit by a zemindar to obtain *khas* possession of land within his estate, if a defendant is a middleman the right of plaintiff follows as a matter of course, unless defendant can make out his claim to exclude the zemindar; but if defendant is a ryot, plaintiff must show some cause of action beyond the bare circumstance of defendant's refusal to quit after notice under Act X of 1859. He must show that the ryot is of a class liable to eviction.

Jackson, J.—This is a regular appeal originally heard before Mr. Justice Markby and myself.* It was remitted to the Court below under Section 354, Code of Civil Procedure, in order to the trial of a particular issue, and the Court below having returned its finding upon that issue, it now comes before the Court again.

* 14 W. R., p. 168.

After the first hearing of this appeal, the view which the two Judges who then sat had entertained upon it at first was not quite identical, and the different points of view are discoverable on a perusal of the judgment; but what I am able to say with great confidence is that the portion of the judgment and the directions in which the two Judges then sitting entirely agreed, are contained in the two concluding paragraphs of the judgment.

We sent the case back to the Deputy Commissioner in order that he might try, after receiving such additional evidence as the parties might think fit to produce, whether the defendant did or did not hold this land under a *kootkuttee* tenure; and we intimated an opinion that, supposing the defendant to fail in that respect, any remedy to which the plaintiffs should appear entitled would be subject to such equitable considerations as might eventually appear to arise: on that point our judgment was expressly reserved.

The case has now come up before us with a finding of fact, against which no objection has been preferred on either side within the meaning of Section 354; consequently, we have to deal with the case on the finding as returned. That finding is that the defendants have not made out a *kootkuttee* tenure, but that the proofs they gave though falling short of that, yet showed that they were tenants and had held the lands under the plaintiffs for a considerable time. That being the case, I think the equitable considerations to which we referred seem to come into play. Consequently, the defendants not being trespassers but being persons who had held this land for a considerable time on payment of rent to the plaintiffs, and the plaintiffs having commenced proceedings against them under Act IV of 1840 in the Criminal Courts, which proceedings were unsuccessful, it seems to me the plaintiffs are only entitled to obtain a decree against the defendants for possession of that land, if by that word "possession" is meant nothing more than that possession of the landlord which is constituted by the possession of the tenant; but if *khas* possession is meant, I think they are not entitled.

Several cases have been referred to by Baboo Romesh Chunder Mitter who argued this case with Baboo Mohesh Chunder Chowdhry, and the decision of the Privy Council in the case of Rajah Saheb Perlada

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Sein* has been much insisted upon as showing that, in the opinion of the Privy Council, where a suit was brought by a zemindar to recover possession of land admittedly within his estate, it lay upon the defendant to show some circumstance or some sort of title so as to exclude the zemindar from what was his apparent necessary right.

Now the case of Saheb Perladh Sein referred to was the suit of a zemindar, not against an under-tenant or ryot, but against a middleman. It appears to me that there is all the difference in the world between the two cases. As against a middleman, the right of the zemindar, which no doubt follows as a matter of course, unless the middleman makes out his case, is the right to receive the gross rents of the villages composing his estate. As against a ryot, on the other hand, the right of the zemindar is not to receive the gross produce of that ryot's land but a right to receive the ryot's rent. Consequently, the zemindar, in bringing a suit to oust the ryot, must show some cause of action beyond the bare circumstance that a notice has been issued on the ryot under Act X of 1859 to quit the land, and that he has omitted to do so. He must also show that the ryot is one of a class liable to eviction.

Under these circumstances, it appears to me that the plaintiff is certainly not entitled to a decree for immediate possession of this land, and it may be that the proper order to have been made is an order for the dismissal of the suit altogether; but looking at what has taken place, it appears to me that all the relief the plaintiff is entitled to in this case is a declaration that the defendants are not entitled to hold and do not hold the land in dispute under the *kootkuttee* tenure, and that such decree should be made.

Under the circumstances, it appears to me that each party should pay his own costs.

Paul, J.—I concur in the decree proposed to be made in this case by my learned colleague. The shape which this litigation has taken renders it necessary that a decree in that form should be made. It is, however, clear to my mind that the defendants were tenants for a long time, that the plaintiff had not *khas* possession for a considerable number of years, and that the allegation contained in his plaint that he was dispossessed on a certain day by order of the criminal authorities is absolutely false. Under these circumstances, the proper decree which, I think, ought to have been made in the initial stage of the cause was a decree dismissing the suit. However, as matters have turned out, and the defendants have gone to trial upon the *kootkuttee* tenure, I think it right in the interests of justice that the plaintiff should have the advantage of having that finding recorded in his favor in the shape of a declaration in the decree. I concur, in the circumstances, that a decree should be made in the form proposed, each party paying his own costs.

* 12 W. R., P. C., p. 6.

The 17th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Act X of 1859—Appeal—Review.

Case No. 399 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 10th January 1871, reversing a decision of the Deputy Collector of Jamalpore, dated the 6th September 1870.

Moneekurnika Chowdhrain (Defendant) *Appellant,*

versus

The Collector of Mymensingh on the part of the Court of Wards (Plaintiff) *Respondent.*

Baboos Sreenath Doss, Mohinee Mohun Roy and *Shushee Bhoosun Sein* for Appellant.

Baboos Unnoda Pershud Banerjee and *Juggadanund Mookerjee* for Respondent.

Quare—Can a judgment under Act X of 1859 be reviewed on the principles laid down in Act VIII of 1859?

Jackson, J.—THE facts of this case are very much the same as the facts of the case to be found in XIV Weekly Reporter, page 27. It may be that there is some omission in the law laid down in Act X of 1859, especially as pointing out how a decision

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can be reviewed which is not a final decision under Sections 153 and 154. This Court decided on a former occasion that there are cases where there must be power to review decisions, and this appears to us to be a case exactly on the point. There cannot be a doubt that the plaintiff is not entitled to the decree which he has obtained. It is not necessary to give at length the facts of the case, but it is clear on those facts that the plaintiff ought not to have the decree which at present stands in his favor. To allow it to remain would be to allow a most unjust and unfair decree to stand against the defendant under which it is sought to sell his tenure and to do him irreparable injury.

If it is the case that there is no clause in Act X of 1859 showing how a review should be admitted, it is just possible that the best principles under which such review should be allowed are those stated in Act VIII of 1859. They are equitable and just; and looking at all the facts we think there are just and reasonable causes why this review was not applied for at an earlier date.

We set aside the decision of the Judge and restore that of the first Court.

Plaintiff will pay costs of this Court and of the Lower Appellate Court.

The 17th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Arbitration—Jurisdiction—Act X of 1859.

Case No. 397 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 29th December 1870, *reversing a decision of the Deputy Collector of that District, dated the* 19*th May* 1870.

Moonshee Gazee (Plaintiff) *Appellant,*

versus

Hameed Buksh (Defendant) *Respondent.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Obhoy Churn Bose for Respondent.

In referring a matter to arbitration all the parties to the suit must accord their written consent; the consent of the pleaders is not sufficient.

Quære:—Does Act X of 1859 empower a Judge to refer a case to arbitration?

Jackson, J.—We think that the Judge has fallen into several errors of law in this case. It was a suit under Clause 6 Section 23 Act X of 1859 to recover possession of a certain jote. On appeal to the Judge, the Judge in the first place, instead of trying and deciding the case himself as he was bound to do, referred the case, at the request of some of the parties, to arbitration. It is very doubtful whether the Judge has power under Act X of 1859 to refer a case to arbitration. There is certainly no clause in the Act empowering the Judge to do so. But even if he had power, there are several points connected with this arbitration which would have invalidated it. In the first place, all the plaintiffs and all the defendants did not agree by any writing or by signing their names to any document to refer the matters in dispute to arbitration. It is true the present appellant before us may have been one of those who may have agreed to the arbitration, and therefore this point might not have been allowed to be taken in special appeal by him had it not been that the arbitration to which he originally agreed had not been actually carried out. At first reference was made to three arbitrators, but on account of some delay in giving their award a single arbitrator was appointed to decide. The Judge states that the pleaders for both parties consented that this single arbitrator should decide the case. It is not sufficient that the pleaders should consent to the arbitration, and it is apparent that none of the parties actually consented to the arbitration of this single person.

Looking to all the facts of the case, we think that the Judge is bound to decide this case himself, and we remand this case to him for decision.

Costs to follow the final result of the suit.

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The 18th July 1871.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Ejectment — Right of Occupancy— Buildings—Proprietary Rights.

Case No. 197 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 24th November 1870, *reversing a decision of the Moonsiff of Aurungabad, dated the 25th March* 1870.

Sufdur Ali Khan and others (Defendants) *Appellants,*

versus

Jeo Narain Singh (Plaintiff) *Respondent.*

* * * * for Appellants.

Mr. C. Gregory for Respondent.

A claim to occupy a building cannot be maintained on the ground of a previous tenant's long occupancy of the land as against a landlord who has, since the death of such tenant, exercised rights of ownership over the land.

A decree for the removal of a building upon his land may be given to the owner even though he has stood by and allowed the defendant to construct it, provided the building is not substantial and has not cost much and the materials may be removed without difficulty.

Bayley, J.—We think this special appeal must be dismissed with costs.

Three grounds have been urged before us in special appeal; *firstly*, that the decision of the Lower Appellate Court is wrong in regard to the plea of limitation in two ways, —in the first place, because there is no evidence of the plaintiff's possession within 12 years of suit,—and in the next place, because in disposing of the plea of limitation the Lower Appellate Court has reasoned with reference to the right of tenancy in a way erroneous in law.

The *second* plea is that according to the custom of the country a suit to eject a tenant from a building would not lie.

The *third* plea is that a decree for the demolition of the house is contrary both to the law and the precedents of this Court, for the plaintiff being a resident of the same village with the defendant, it must be presumed that he (plaintiff) was aware when the house was commenced to be built, and not having interfered must be presumed to have given an implied consent to its completion. The facts of the case are these:—The plaintiff sued for possession of certain lands and demolition of a building erected thereon, valuing the suit at rupees 100. The plaintiff's allegation was that the land in dispute with the house standing thereon was his, plaintiff's, property, but permissively in the occupation of one Himmut Ali Khan who held it for a very long time; that after his death the house fell down and the plaintiff re-occupied it as his sole property, exercising his right of ownership by cultivating the land and receiving the profits thereof.

The defendants' case was that the land in dispute belonged to their predecessor, Akbur Ali, with two houses standing thereon, one of which he occupied himself and the other he gave to Himmut Ali, after whose death they (defendants) joined that house with their own and that plaintiff had no right or title thereto.

The first Court dismissed the plaintiff's suit.

On appeal the Lower Appellate Court gave the plaintiff a decree to the effect that the "plaintiff do recover possession of the land "under claim by demolishing the house "prepared by the defendants, and also "costs," &c.

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In special appeal, the three grounds as above stated have been pressed before us.

As to the *first* objection, the facts show that both before the first Court and the Lower Appellate Court the question of limitation depended entirely on the merits of the case, *viz.*, whether the plaintiff had possession within 12 years of suit of the land on which the house stood by virtue of his own exclusive right.

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On the *second* ground, *viz.*, that according to the custom the plaintiff cannot sue to eject the tenant from the building, it is true that the point pressed upon us is that the plaintiff cannot interfere with the *dukhul* (possession) of the defendants, but it must be remembered that in this case it is put on the ground that the possession (*dukhuleabee*) was kudimee. As Himmut Ali died after being in possession for 20 or 30 years, it is likely that such a right did accrue in his case, but the defendants could not admittedly build their house before Himmut Ali's death, and we have a finding that after Himmut Ali's death and the fall of the building the plaintiff exercised right of ownership over the lands in dispute, so that the plea of custom, which might be the basis of the defendant's objection on proof of very long occupation, does not apply under the facts of this case.

As regards the *third* objection, *viz.*, that the Lower Appellate Court is wrong in giving the plaintiff a decree for the demolition of the building, each case of this kind must depend upon its peculiar facts and circumstances. In some cases where a co-sharer stands by and allows his co-parcener to raise and complete a building under their very eyes without any kind of objection whatever (such as in Janokee Dassia's case, Sudder Dewanny Adawlut, 1856) it was held that the co-sharer must be presumed to have given an implied consent and is not entitled to demolish after the building is completed. In other cases, where it is found that there has been some neglect on the part of the plaintiff and there is some ground for belief in the good faith of the defendant, and it is seen that a considerable expense has been undergone by him, the Courts have only awarded damages to the plaintiff and not ordered demolition.

In a third class of cases where the building is not of any permanent or substantial kind or built at any very great expense, and where the materials may be removed without difficulty, a reasonable time is awarded to remove such materials and the land is made over to the rightful owner.

Now, here it is admitted by both parties that the house is one of mud walls with tiled chupra roof, and under the circumstances we think that a reasonable time, *viz.*, one month from the date of the passing of this decree, should be allowed to the defendant, in order that he may remove the materials of the house without interfering with the plaintiff's exclusive right of ownership over the land.

In this view, we modify the decree of the Lower Appellate Court, and dismiss this special appeal with costs.

The 18th July 1871.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Joint family estate—Presumption—Onus probandi.

Case No. 244 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of 24-Pergunnahs, dated the 29th July 1870.

Hurish Chunder Doss (Pauper Plaintiff) *Appellant,*

versus

Gouree Pershad Chatterjee and others (Defendants) *Respondents.*

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Mr. M. M. Datta and Baboo Romanath Bose for Appellant.

Baboos Juggadanund Mookerjee and *Ashootosh Dhur* for Respondents.

In a suit for property acquired from the proceeds of an alleged joint trade, the joint character of which is neither admitted nor proved, the *onus* lies in the first instance on the plaintiff who is not entitled under the circumstances to the ordinary presumption of Hindoo law arising from the existence of joint family estate.

Mitter, J.—We are of opinion that the judgment of the Subordinate Judge in this case ought to be affirmed. It is admitted on both sides that there was no ancestral property from the proceeds of which the properties in dispute could have been purchased, and it is also admitted that the whole of those properties were purchased out of the proceeds of a trade in wood which was carried on in the name of Ram Rutton, and Ram Rutton alone. In this state of things, the only question which we have to determine is whether that trade was the joint trade of the plaintiff's father, Goroo Churn, and Ram Rutton, and afterwards of the plaintiff and of Ram Rutton. On this question the weight of evidence is certainly in favour of the defendant, respondent. We have got the testimony of the maternal uncle of Ram Rutton. He gives a full, clear, and detailed account of Ram Rutton's life, showing how he commenced business, and how the trade in wood at Doorgapore was set up and carried on by him on his exclusive account. Then, again, we have the evidence of Sreeram Sircar, a man who was in the employ of Ram Rutton for a great number of years. He also clearly and distinctly swears to the fact that the trade in wood carried on by Ram Rutton was exclusively his, and that neither the plaintiff nor his father Gooroo Churn had any interest of any kind in it. But above all, the mode in which Ram Rutton was allowed to deal with most of the properties in dispute affords the strongest ground for supposing that the plaintiff's case is quite unfounded. We find it proved by evidence, the credibility of which has not been questioned in any manner whatever, that most of these properties were dealt with by Ram Rutton as his own and exclusive properties; that they were mortgaged by him to different individuals who advanced considerable sums of money on the belief that they belonged exclusively to him; and that during the whole of this time the plaintiff never brought forward any objection upon the ground that he was interested in any of these properties as a joint owner with Ram Rutton. The plaintiff said in his depositions in the lower Court that he knew nothing about these transactions; but this is a statement which we are by no means inclined to believe. We further find upon his own admission that there are other properties still in the exclusive possession of Ram Rutton's widows, to which he has not yet advanced any claim whatever. It has been said that the plaintiff's cause of action with reference to those properties is different from his cause of action in respect of the properties now in dispute. But this is no explanation whatever of the strong inference which arises from the fact above referred to against the truth of the plaintiff's case. If it is true that his aunts dispossessed him from those properties after the death of his uncle Ram Rutton and are still retaining them in their exclusive possession, it is almost incredible that those very aunts should come forward and try to support, by their oaths, the case now set up by him upon the ground that the whole of the properties acquired by Ram Rutton were acquired from the profits of the joint trade.

It has been further contended that the burden of proof has been wrongly thrown upon the plaintiff. It is quite clear under the circumstances of the case that the burden of proof was in the first instance upon the plaintiff; inasmuch as there is no proof whatever of the existence of any joint property. Consequently, in the absence of any admitted nucleus to start with, the plaintiff cannot get the benefit of the ordinary presumption of Hindoo law arising from the existence of an admitted or proved joint undivided family estate. But be that as it may, it is quite clear from the record that the weight of evidence is entirely in favour of the defendant, and we are therefore of opinion that this appeal ought to be dismissed with costs, including the value of the stamp for which the plaintiff is liable to the Government.

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The 19th July 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble J. B. Phear, *Judge.*

Limitation — Contract — Demand — Clause 9 Section 1 Act XIV of 1859.

Case submitted for the opinion of the High Court by the first Judge of the Court of Small Causes at Calcutta.

Brohmo Moyee Dassee (Plaintiff)

versus

Obhoy Churn Chowdhry (Defendant).

Mr. Marindin for the Plaintiff.

Mr. Macrae for the Defendant.

The plaintiff, a Hindoo widow, sold to the defendant certain land, which formed part of the estate of her deceased husband, for a sum of rupees 800. The price was paid to the plaintiff, who on the same day made it over to the defendant under an agreement that she should receive 6 rupees monthly by way of interest and that the principal sum should be re-payable on demand. Interest was paid accordingly by the defendant for 8 years up to the end of March 1869, when the defendant discontinued payment of interest. The plaintiff thereupon demanded re-payment of the principal, which the defendant refused. On the 4th July 1870 the plaintiff instituted the present action against the defendant for the recovery of the principal sum lent, with interest from the date when it was withheld up to the date of suit.

The defendant pleaded that the claim was barred by limitation under Clause 9 Section 1 Act XIV of 1859.

HELD that the contract in this case was alternative and contained two distinct and separate obligations; *first*, an obligation to pay 6 rupees month by month by way of interest; and *secondly*, an obligation to repay the principal on demand; and the case fell within the rule that where by the terms of the contract, either express or implied, it is stipulated that a request or demand of performance shall be made, such demand must be made in order to complete the cause of action. The suit which was brought within three years from the date when plaintiff first made demand for re-payment, was accordingly held not to be barred.

Case.—ON the 26th March 1866, the plaintiff, who is a Hindoo widow, being in indigent circumstances, sold certain land situated in Calcutta, which formed part of the estate of her deceased husband, to the defendan for a sum of rupees 800. The price was paid to the plaintiff, who on the same day made it over to the defendant under an agreement that she should receive six rupees monthly by way of interest and that the principal sum should be re-payable on demand. Interest was paid accordingly by the defendant for three years up to the end of Chyte 1275 (March 1869). From that date the defendant discontinued payment of interest. The plaintiff thereupon demanded re-payment of the principal, which the defendant refused. On the 4th July 1870 the plaintiff instituted the present action against the defendant for the recovery of the principal sum lent, with interest from the date when it was withheld up to the date of suit.

It is pleaded for the defendant that the claim is barred by limitation under Clause 9 Section I Act XIV of 1859.

It has been held in certain cases decided in this country, in accordance with decisions of the Common Law Courts in England, that where money is lent under an agreement that it shall be re-payable on demand, a cause of action arises instantly on the loan being made and that limitation runs from the date of the loan,—Herupammal *versus* Hanuman, 2 Madras High Court Reports, 472, Parbutty Churn Mookerjee *versus* Ramnarain Muttylall, 5 Bengal Law Reports, p. 396.*

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* *Ordinary Original Civil Jurisdiction.*

The 11th March 1870.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Parbutty Churn Mookerjee

versus

Ramnarain Muttylall.

Messrs. Woodroffe and *Evans* for Plaintiff.

Messrs. Marindin and *Branson* for Defendant.

THE plaintiff seeks to recover 1,100 rupees, being the balance of an amount deposited by him with three brothers, Nilmoney, Gobind Chunder, and Ramnarain Muttylall. The plaintiff states the deposit was made in 1255, and that the three brothers agreed to pay him 9 rupees per month for interest, which was in fact for years paid to him by them or their representatives. The case which the plaintiff has proved is that he was a distant relation and dependant of the family of Bissonath Muttylall, the father of Nilmoney, Gobind Chunder, and Ramnarain Muttylall, and that he had lived in their family dwelling house for many years; that in 1255, being about to leave Calcutta and to take up his abode permanently at Benares, he placed in the hands of the three sons of Bissonath (who was then dead) the sum of rupees 1,200, when it was agreed that the money should remain with them and they should remit him 9 rupees monthly, but that when he wanted back the principal

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In this last case, however, Mr. Justice Macpherson, while giving effect to the English decisions, expressly dissents from the principle on which they proceed, and intimates that if the matter were *res integra* he would have held that where the contract is to pay on demand, no cause of action can arise till demand has been made, and that limitation does not run from the date of the loan but of the demand.

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he should have it. It is proved that the plaintiff went to Benares and that the 9 rupees were remitted from 1255 until within the 12 months, or thereabouts. It is proved, I think beyond all doubt, that the 9 rupees per month were from time to time remitted till recently; but I do not decide (because in the view I take of the plaintiff's position it is unnecessary for me to decide) whether any part of the 9 rupees was remitted by or with the knowledge of the sons of Nilmoney or of the sons of Gobind Chunder. I leave the question whether they or any of them made those payments open.

It is contended on behalf of the sons of Nilmoney and Gobind Chunder that the suit is barred as the money was not a deposit within the meaning of Clause 15 of Section 1 of Act XIV of 1859 Ramnarain Muttylall admits the plaintiff's claim, but says that as one of the three brothers (who were joint in all respects at the time they received the money) he is liable for only a one-third share of it. I think it impossible to treat the transaction as a deposit within the meaning of Clause 15, for there never was any deposit of property or money which it was intended should be returned specifically. It seems to me, however, that the plaintiff might have not unreasonably contended that his cause of action did not arise till early in 1869, when he first demanded the re-payment of his principal. In applying the provisions of Act XIV of 1859, the date on which the cause of action first arose must always be ascertained with accuracy. And as the plaintiff had agreed to leave the money in the hands of Nilmoney, Gobind Chunder, and Ramnarain until he asked them to give it back to him, it appears to me that the natural and logical mode of ascertaining when the plaintiff's cause of action arose would be to inquire when he first demanded back his money. There was, in fact, no contract by the defendants to return the money till it was demanded; and if the matter were open to me now, I should have no difficulty in deciding that the cause of action did not arise till 1869, when the plaintiff first demanded back his money. But I do not consider that the question is still open to me after the reported decisions in English cases in which it has been held that when money is payable on demand the period runs from the date of the agreement to repay on demand. I confess I do not appreciate the principle on which those cases are supposed to be decided. The English cases, however, being such as they are, though I dissent from them, I consider myself bound to follow them and bound to hold that the cause of action arose when the money was put in the hands of the three brothers, and therefore that the suit is now barred. I do not, however, consider that these parties stand on exactly the same footing as the parties in the ordinary cases where money has been deposited with a Banker. The position of the parties and the contract entered into seems to me to be of a different nature in some material respects; but the money being payable on demand, I am bound, as I have said, by the English cases.

Judgment will go against Ramnarain for the full amount, as he admits the contract to be such as the plaintiff alleges and that the principal remains still unpaid and justly due. But the suit will be dismissed against the other two defendants with costs on scale No. 2. The plaintiff is entitled only to costs on scale No. 1.

In the more recent case of Prankishen Banerjee *versus* Tarinee Persaud Ghose, 14 W. R., p. 224, a Division Bench of the Calcutta High Court have not merely expressed their dissent from the rule followed by the English Courts, but have declared that there is no authority for applying it to suits in the Mofussil Courts in this country. In this case Mr. Justice L. S. Jackson observed :—"When A lends money to B "re-payable on demand, with interest at a "certain rate, and B in pursuance of that "agreement pays interest to A, A making "no demand for re-payment, no cause of "action accrues to A so that he becomes "entitled to bring a suit. So long as the "borrower observes his part of the contract "by paying interest, and so long as he is "not apprized of the lender's desire to have "back his principal sum, I think there is no "cause of action: the principal sum has "not become due and the statute does not "begin to run."

If this be a correct view of the law applicable to a suit between Hindoos in the Mofussil Courts, there does not appear to me to be any reason for applying a different rule in a case between Hindoos brought in a Small Cause Court in a Presidency Town.

I have accordingly held that the plaintiff's action, having been brought within three years from the date when she first made demand for re-payment, is not barred. This decision is, however, at the request of the defendant, given subject to the opinion of the Judges of the High Court upon the question of limitation.

It may be noticed that in the new Limitation Act (No. 58, Schedule II) it is expressly provided that in a suit for money lent under an agreement that it shall be payable on demand, limitation shall only run from the time when the demand is made. This may be taken to show that the Legislature did not regard the doctrine of the English Courts as founded on any natural or necessary principle of law.

When the case came on before the High Court, Macrae for the defendant was first called on to address the Court. He contended that the rule of the English cases governed the matter, and that the rule itself was reasonable and was not peculiar to English Law. An obligation rested on the debtor from the moment of the debt, which he might discharge at any moment whether the creditor were willing or not;

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and if he did not do so, but waited for the creditor to sue him, he was guilty of that inadvertence which Mr. Austin required to complete the creditor's cause of action. As no notice of payment was due from the debtor to the creditor, so no demand was due from the creditor to the debtor. If the creditor brought his action without a demand, the Courts of this country would probably exercise their discretion by refusing him costs. In the course of his argument, the following authorities were cited by Mr. Macrae:—Co. Litt. 208*b*; Rolle's Abr., Condition, H.*e*; Collins *vs.* Denning, 3 Salk., 227; Farquhar *vs.* Morris, 7 T. R., 124; 1 Selwyn's Nisi Prius, 344; Norton *vs.* Ellam, 2 M. and W., 461; Gibbs *vs.* Southam, 5 B. and Ad., 911; Byles on Bills, 10th Edn., p. 215; Herupammal *vs.* Hanuman, 5 Mad. H.C. Reports, 472; Parbutty Churn Mookerjee *vs.* Ramnarain Muttylall, 5 Ben. L R., 397*; Tarinee Pershad Ghose *vs.* Prankissen Banerjee, 14 W. R., 224; Moonshee Abdool Ali *vs.* Tara Chand Ghose, 6 Ben. L. R., 292; Colebrooke's Digest, Book I, Ch. 5, Section 166, sl. 2; Colquhoun's Roman Civil Law, Sections 2216, 2217; Pothier on Obligations, Part II, Chap. 3, Art. 3, Section 1; Story on Promissory Notes, Ch. 6, Section 207 (American case); Austin on Jurisprudence, Vol. II, p. 157.

Marindin for the plaintiff was commenting on the English cases which were cited by Macrae and contending that they did not apply to the present case, when the Court stopped him and called on Macrae to meet its view that the contract in this case was alternative and that it differed from an ordinary contract to pay interest so long as a debt remained unpaid. Before he was stopped Marindin had cited Carter *vs.* Ring, 3 Camp., 459; Simpson *vs.* Routh, 2 B. and C., 682; Fenton *vs.* Emblers, 1 Wm. Black., 352; and Barough *vs.* White, 4 B. and C., 325.

Macrae then submitted that the contract was not a written one, but was merely in effect stated by the Court below and the defendant ought not therefore to be held too strictly to the terms used by the lower Court, and that the fair construction of the contract was that the defendant engaged to pay interest to the plaintiff at the rate of 6 rupees a month on the principal sum so long as that sum remained in his hands, and that if return of the principal were demanded in the middle of a month there was nothing in the contract to prevent the debtor from re-paying it with the proportional amount of interest for the broken period of the month due at that date.

The following judgments were delivered by the High Court:—

Norman, C. J.—The case stated by the first Judge of the Small Cause Court is that "on the 6th March 1866 the plaintiff, a "Hindoo widow, sold certain land situated "in Calcutta, which formed part of the "estate of her deceased husband, to the "defendant for a sum of rupees 800. The "price was paid to the plaintiff, who on the "same day made it over to the defendant *under an agreement that she should receive "six rupees monthly by way of interest and "that the principal sum should be re-payable on demand.* Interest was paid accordingly by the defendant for three years "up to the end of Cheyt 1275 (March 1869). "From that date the defendant discontinued "payment of interest. The plaintiff thereupon demanded re-payment of the principal, which the defendant refused. On the "4th July 1870 the plaintiff instituted the "present action against the defendant for "the recovery of the principal sum lent, "with interest from the date when it was "withheld up to the date of suit."

The question is whether the suit is barred by Clause 9 Section 1 Act XIV of 1859. The first Judge of the Court of Small Causes referring to the case of Tarinee Persad Ghose *vs.* Prankishen Banerjee, 14 W. R., 224, was of opinion that the suit was not barred, and accordingly made a decree in favor of the plaintiff subject to the opinion of this Court on the question above stated.

It is necessary to observe that the contract in the present case is not a single, entire, indivisible, contract* to pay the sum lent *with* interest, as in the case of Norton *vs.* Ellam, 2 Meeson and Welsby, 461.†

* See the case given as a foot-note at page 164.

* As to the effect of such a contract when the contract is to pay principal and interest on a certain day, *see* Watkins *versus* Morgan, 6 Car. and Payne, 661.

† The rule that when no time is fixed for the performance of a stipulation, the obligor is bound to perform the stipulation immediately, and not merely when he shall be apprised of the wish of the obligee, is by no means peculiar to English law.

The American rule follows that of English Law. Story on Bills, Ch. IX, p. 281.

The rule of the Civil Law is similar.

In Domat's Civil Law, Part I, Book I, Tit. I, Section III, para. 186, it is said:—"If it has been omitted "in a covenant to express the term of payment, or

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It contains two distinct and separate obligations, *viz.*, first, an obligation to pay 6 rupees month by month by way of interest; and, secondly, an obligation to repay the principal on demand. The plaintiff does not bind herself to allow the principal money to remain in the hands of the defendant for any definite period of time, and I think it must be admitted that, according to the true construction of this contract, the plaintiff would at any time have a right to demand payment of the principal; and by parity of reason the defendant would at any time have a right, instead of continuing the monthly payment of six rupees, to pay off the principal.

In construing contracts no rule is better established than that full effect must be given to every part of the contract. If the contract with which we have to deal be treated as an obligation to pay six rupees a month, and also as an obligation to repay the principal sum immediately without any demand, the two parts of the contract would be repugnant. The defendant, however willing to perform his part of the contract, would not know whether to repay the rupees 800 at once or to wait for a month and pay the six rupees.

But if the two obligations are construed as alternative—if the term *on demand* is to be construed as if it were written *upon being thereto requested* or *after demand*, the whole contract becomes consistent and intelligible. The defendant is bound to pay to the plaintiff a monthly sum of six rupees, until the principal sum rupees 800 be demanded; and immediately on such demand, and not before, except at his own election, the defendant is liable to pay to the plaintiff the principal sum of rupees 800. If this view of the case be correct, the case before us falls within the rule that where, by the terms of the contract, either express or implied, it is stipulated that a request or demand of performance shall be made, such demand must be made in order to complete the cause of action.

This must always be the case if the obligation is in the alternative, and the obligee has the right of election.

In the present case, while the plaintiff consents to receive the six rupees a month and the defendant pays that sum regularly, the defendant is under no obligation to pay the rupees 800 to the plaintiff. The defendant retains the money on terms analogous to those in which a tenant-at-will holds land on payment of a fixed rent. In order to determine the tenancy in the one case, and the right to retain the money, making the monthly payments, in the other, as notice in the one case, so a request for payment in the other, would seem to be necessary. If the construction suggested be correct, as long as the defendant fully performs the first of the two alternative obligations by paying the sum of 6 rupees monthly, the contract continues to be fully performed and there is no breach of it.

The case may be compared to that of the grant of an annuity which the defendant has a right to redeem on payment of the purchase money.

The case of Cowper *vs.* Godmond, 9 Bingham, 748, is somewhat analogous to that now before us. There the sum of £1,999 had been paid by the plaintiff as the consideration for an annuity of £237 in May 1824. Payments on account of the annuity were made by the defendant till the year 1829. In the year 1830 the defendant obtained an order from the Court of King's Bench setting aside the warrant of attorney and judgment by which the annuity was secured, upon the ground that the grant of the annuity was void on account of a defect in the memorial. The plaintiff then

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"delivery of any other thing promised, it is a consequence of the covenant that since the term is added only in favor of the person who is obliged, if no time is allowed him for performing what he ought to do or to give, he is bound to give it, or do it, immediately and without delay; unless it happens that the performance of the covenant implies the necessity of a delay, as if the performance is to be made in another place than that where the parties entered into the covenant." *See* also the Digest, Book XLV, Tit. I, De Verborum Obligationibus, Section 41, Clause 1; and Book L, Tit. XVII, De Regulis Juris, Section 14. "*In omnibus obligationibus in quibus dies non ponitur, præsenti die debetur.*"

So in the Roman Dutch Law, Van Leeuwen, Book 4, Chap. 3, Section 3, p. 324. "The effect of a promise made to be performed simply is, that it acquires its commencement immediately, and the acceptor thereby acquires without delay a right, and an action."

The French Code seems to lay down the same rule. Code Civil, Book III, Tit. III, Section 1187.

The Scotch Law follows the Civil Law on this point Bell's Principles of the Law of Scotland, Sections 45 46, 69, 201; Erskine's Principles of the Law of Scotland, Book III, Tit. 1, Section 3, page 277, Edition of 1870; Napier on Prescription, p. 774. The rule requiring notice to the debtor if he can be found before commencing the action under the Roman Law, as mentioned by Mr. Austin, does not qualify the nature of the obligation in this country. The discretion of the Court as to costs is a sufficient protection to the debtor.

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brought his suit to recover back the consideration. The defendant objected that the suit was barred by limitation on the ground that the right of action accrued at the time of the original contract in 1824.

Tindal, C. J., says:—"The question is whether the plea of the statute of limitations is a bar to an action for money had and received for recovery of the consideration money of a void annuity, when the annuity was granted more than six years before action brought, but was treated by the grantor as a subsisting annuity within that period? That question depends upon another, within what time did the cause of action arise? The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of the annuity. The cause of action was, therefore, not complete till the last step was taken in Michaelmas Term, 1830. If we were to decide otherwise, the grantor of a defective annuity might in every case defraud the annuitant by paying the annuity for six years, and then, having set aside the security, pleading the statute of limitations."

It is true that this case is not precisely in point, because, as was pointed out by Serjeant Wild in argument, the *grantee* was precluded from questioning the validity of the annuity, and consequently could maintain no action till the grantor had elected to avoid the annuity. In the present case it was in the power of the plaintiff at any time by notice or demand to determine the defendant's obligation to pay the monthly sum of six rupees, and to call on him to perform the other branch of the agreement. But the fact that the plaintiff had an option to that effect does not show that she was bound to exercise it. Nor can it be presumed, for the purpose of defeating her right by a plea of limitation, that she had exercised that option when such presumption would be contrary to the fact. It may be that the defendant, by ceasing to pay the monthly instalment of interest, might render it unnecessary for the plaintiff to make a demand before bringing any suit. But on that point it is not necessary to express any opinion.

If the true construction of this contract be as I have supposed, it is clear that the suit, having been brought within three years from the date of the last monthly payment and within three years from the demand, is within time. I prefer to rest this case on general grounds,—upon the construction, and what I conceive to be the true meaning, of the contract.

But another ground was also put forward on which the plaintiff's case may be rested, *viz.*, that the parties are Hindoos, that within the original jurisdiction of the High Court, by the 17th Section of the 21st Geo. 3 Cap. 70, matters of contract and dealing between party and party are to be determined, in the case of Hindoos, by the laws and usages of Hindoos; that by the Hindoo law a loan which has been received from the hands of another in the form of a loan at interest, shall, if the time of payment be not expressed, be paid on demand with the interest then due, if not previously demanded, when interest ceases or becomes equal to the principal. In support of these propositions the text of Vrishaspati, Colebrooke's Digest, Book 1, Chapter V, Verse 166, was cited.

In Halhed's Code of Gentoo Laws, Chapter 1, Section 4, p. 17, it is said, if a man lends money with a stipulation to be paid on demand, and the borrower consents to take it upon this restriction, he shall accordingly pay it when demanded.

I desire to guard myself from being supposed to assent to the views of Mr. Austin, stated by the Court in the case of Tarinee Pershad Ghose *versus* Prankissen Banerjee, 14 W. R., p. 224. I cannot but think that, however plausible those views may sound, it might be quite another matter if they were reduced into practice.

To say as a matter of general law that a tradesman who sells goods to a customer without any express stipulation as to the time of payment, or that a banker who lends a customer money or honors an overdraft, cannot sue until after a demand of the money, would be to introduce a new element into mercantile law, for which there is certainly no authority, and which I believe would lead to most inconvenient consequences.

The present case is similar in all respects to that before Mr. Justice Macpherson in the 5th Bengal Law Reports, page 396,*

* See foot-note at page 164.

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where that learned Judge expressed in very strong language his opinion that the suit was not barred, though he decided otherwise, considering himself bound by English authorities, which, I think, do not decide the question. The decision of the Judge of the Small Cause Court appears to me to be correct. The plaintiff will get the costs of, and occasioned by, the statement of the case.

Phear, J.—I concur. It is settled in English law by the authority of such cases as Norton *vs.* Ellam (2 M. and W., 461) that a simple promise to pay money on demand constitutes an obligation to pay the money at once, whether demand be actually made or not; and that consequently an action can be brought to compel payment, without any previous demand, at any the earliest time after such a promise is made. The same is the case if the promise be a promise to pay money on demand with interest, the only difference between these two instances being that in the latter the debt grows with the time, while in the other it remains constant. But the case is materially altered when any additional element is introduced into the contract. In the matter before us, as I understand the learned first Judge's statements of the facts, it was agreed between the parties that while the money was to be repaid on demand, yet, until re-payment, the plaintiff was to receive *periodically*, namely, every month, a specified sum by way of interest. This latter stipulation is in its character, so to speak, alternative to the first, and clearly involves duration. It seems to me that by agreeing to this the plaintiff impliedly undertook to wait from month to month for the payment of this sum, unless meanwhile she made demand for the principal. In other words, the contract must be considered as a whole, and the promise to pay on demand cannot be treated as separate from, and unaffected by, the arrangement for periodic payments of money by way of interest. As long as the plaintiff forbore to make demand of the principal, and the defendant at the stipulated periods paid the monthly sums by way of interest, so long it was, as it seems to me, impossible in reason to say that the plaintiff had any cause of suit; the contract was clearly in the course of being carried out just as the parties intended it should be.

The 19th July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Innocent purchaser—Fraud—Compensation.

Case No. 52 of 1871.

Special Appeal from a decision passed by the Judge of Patna, dated the 28th October 1870, *affirming a decision of the Subordinate Judge of that District, dated the* 16*th July* 1870.

Sohun Singh (one of the Defendants) *Appellant,*

versus

Keola Bibee (Plaintiff) and another (Defendant) *Respondents.*

Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale and *Baboo Kalee Kishore Sein* for Respondents.

A party purchasing what he knows to be the right and title of some one else than his vendor cannot claim the character of an innocent purchaser; and is not entitled to compensation for improvements to the property so purchased by him.

Glover, J.—One Huzooree Mull had two daughters, Keola Bibee and Khyaloo. Khyaloo was married to Koonjoo Lall and had a son Rajaram. The plaintiff, who is the eldest daughter of Keola Bibee, sued to recover possession of one-half of the family house erected on a part of the property which has been sold by Koonjoo Lall as the representative of his minor son Rajaram to the defendant. The defendant says that he bought this property which had at the time the ruins of a pucca house upon it from the party entitled to sell it, that he went to considerable expense in building upon it and repairing the ruins of the house, and that he cannot, under any circumstances, be turned out. He likewise pleads that the plaintiff's suit is barred by limitation, a period of more than 12 years of adverse possession having elapsed from the date of his cause of action.

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The act of dispossession is stated by the plaintiff to be the purchase from her sister's husband in 1863 and the suit was brought in 1870. It appears that Huzooree Mull's property had been on his death improperly taken possession of by Jusoda Kooer. It appears also that both the sisters brought suits against Jusoda Kooer in which they succeeded and took out execution of the decrees and got possession of the property.

The Judge concurring with the Court below found that no limitation applied, inasmuch as one of the sisters Khyaloo took possession of the property in execution of her decree, and that there was nothing to show that her possession was adverse to her sister. He found also that the house was in ruins and that it was impossible to say she took possession for herself alone. He rather considered it in the light that the possession was not only for herself but likewise as trustee for and representative of her sister. The Judge, therefore, found that the plaintiff's suit was not barred by limitation. With regard to the question of compensation the Judge found that the defendant had bought this property with his eyes open, knowing perfectly well that there was another claim to an 8 annas share of the estate, and that he was purchasing not from the real owner but from a person acting as guardian to the owner, and as the Judge expressed it that he did not come into Court with clean hands.

In special appeal, it is contended, 1st, that the plea of limitation has not been properly tried; 2nd, that the Judge had no right to decree the demolition of the house; and 3rd, that in any case the defendant ought to have had compensaion allowed him for the expenses he had incurred on the buildings.

With regard to the first point, the issue of limitation, the Judge has held, for reasons given by him in his judgment, that the possession of the defendant's vendor, that is to say, the sister of the present plaintiff, was not adverse to her, but that the one sister held the property as trustee and representative of the other; but it appears to us that he might even have gone further and have held that both sisters equally got possession, for it has been found as a fact by the Court of first instance that both Keola Bibee and Khyaloo brought suits against Jusoda Koer; both got decrees; both took out execution and both got possession in execution of these decrees. That being so, it is clear that the present plaintiff got possession of the property sometime in 1862, so that even putting aside the question how far her sister's possession was a possession on trust also for Keola Bibee, it seems clear to us that Keola Bibee had possession on her own account as well as Khyaloo.

Then with regard to the second objection, that the Judge should not have decreed the demolition of the house, the shortest answer is that he has not done any such thing. He has merely decreed to the plaintiff possession of a moiety of the house, that being her share of the fainily estate, and the defendant is left in possession of the other moiety which he purchased from Koonjoo Lall, the father of Rajaram, and which purchase Rajaram, who has since attained his majority, has concurred in.

With regard to the third objection, that the defendant should have had compensation awarded him, it appears to us that the defendant is not in a position to claim such compensation. It is not as if he was an innocent purchaser who bought the property *bonâ fide* believing that his vendor had the power to sell it, and so believing had gone to large expense in the erection and improvement of buildings, the real owner all the time looking on and saying nothing. This is a case in which the purchaser knew perfectly well that there was another sister surviving, another daughter of Huzooree Mull who had an 8 annas share in the estate, and he knew also or must have known that at that time that sister had already brought a suit to recover her 8 annas share. It is impossible, therefore, that the defendant can assume the character of an innocent purchaser: he knew that what he was buying was the right and title of some one else than his vendor. With regard to the expenses which he says he has been at, we may remark that what he has done has not been to re-build a pucca house, but to take advantage of some pucca walls covering them with tiled roofs so as to make the house habitable; but this is a very different thing from building a new pucca house, whilst the real owner stood by and said nothing. In the case of Thakoor Chunder Paramanick *versus* Ram Dhun Bhuttacharjee, to be found in Volume VI Weekly Reporter, page 228, the Full Bench of this Court have ruled that where a person who makes improvements in property is not a mere trespasser, but is in possession under a *bonâ fide* title or claim to title, he is entitled either to remove the materials or to obtain

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compensation for the value of the building at the option of the owner; but in this case the defendant did not hold possession as a *bonâ fide* purchaser. On the contrary, it has been found by the Courts below that he knew perfectly well that there was another claimant to the estate, and knowing this that he bought fraudulently from Koonjoo Lall.

All the grounds of special appeal therefore fail, and we dismiss the appeal with costs.

The 20th July 1871.

Present:

The Hon'ble L. S. Jackson and G. C. Paul, *Judges.*

Funeral ceremonies—Intangible rights.

Case No. 368 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 23rd December 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 9th May 1870.

Jhummun Pandey (one of the Defendants) *Appellant,*

versus

Dinoonath Pandey (Plaintiff) *Respondent.*

Baboo Gopeenath Banerjee for Appellant.
Mr. R. T. Allan for Respondent.

A *Birth Moha Brahminy* or right to officiate at funeral ceremonies is incapable of transfer.

Jackson, J.—It appears to us that the special appeal in this case must succeed. That which the plaintiff sought to recover was,* as found by the Court of first instance, a thing intangible and impalpable; and there are many ways in which the case might be put to show that such a thing as the alleged right in question is incapable of transfer. It could not be attached and sold nor could delivery of possession be given. Therefore, the Moonsiff was right in dismissing the suit, and the decision of the Subordinate Judge which reversed that judgment was wrong, and must, so far as the special appellants are concerned, be set aside with costs.

* Possession of Birth Moha Brahminy, *i. e.*, a right to officiate at funeral ceremonies.

The 21st July 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Evidence in execution—Mesne profits—Rule of assessment.

Case No. 140 of 1871.

Miscellaneous Appeal from an order passed by the Judge of 24-Pergunnahs, dated the 7th November 1870, affirming an order of the Sudder Moonsiff of that District, dated the 9th August 1870.

Kalee Debee and others (Judgment-debtors) *Appellants,*

versus

Modhoo Soodun Chowdhry and others (Decree-holders) *Respondents.*

Baboo Oopendro Chunder Bose for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

In the execution of a decree for the possession of land if it is found that the boundaries described in the plaint are no longer in existence, it is allowable to take the evidence of witnesses to ascertain their former position.

The rule for the assessment of mesne profits is that the right of the true owner is to all the profits of the land, and not merely to the amount of the cash collections, during the time that he is illegally kept out of possession, and the trespasser must be held responsible for all that he has realized and receive credit for every thing for which he is entitled to credit; such as rents paid and charges for collection. He does not lessen his responsibility by remitting rent or neglecting to make collections.

Ainslie, J.—The contention of the special appellant in this case is founded on two

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decisions of this Court, one reported in Volume XII of the Weekly Reporter, page 99, and the other in IX Weekly Reporter, page 445, Civil Rulings.

The first objection taken is that the Court below cannot in execution of a decree take any fresh evidence as to the boundaries of any property which may be the subject of that decree, when such boundaries are not capable of being determined by and specified in the language of the decree itself.

The judgment of Sir Barnes Peacock in Volume XII does not, as I take it, go to the extent to which the pleader for the special appellant would wish to carry it. Sir Barnes Peacock in that case says that the plaintiff could not be allowed to go into evidence for the purpose of contradicting the decree, or for the purpose of ascertaining in the execution department what the Judge ought to have ascertained in the trial of the suit. But he certainly does not lay it down as a rule that in no case can evidence be taken in the course of execution proceedings.

In the present case, we see from the report of the Ameen that some boundaries which were described in the plaint as consisting of *bherees*, or earthen banks, are not now in existence, and that he had to ascertain their former position by taking the evidence of witnesses. If this is not allowed to be done, it is quite clear that a defendant in possession would in any similar case be able to defeat a decree obtained against him by simply removing any landmarks mentioned in the plaint for the purpose of defining the boundaries of the property in suit.

It has been stated before us by the special appellant that the lands in plots 2,3,4 and 12 are not the lands claimed in the plaint, because they cannot be identified by the boundaries therein set forth.

We find that the description of the boundaries as given in the plaint does not correspond with the boundaries as they exist at present; but the Courts below have found that the lands which the Ameen made over to the plaintiff are in point of fact the lands which formed the subject of suit, and with this finding, as a finding of fact, we cannot interfere on special appeal.

As to the wassilat ormesne profits, it is contended that they have been awarded on a principle opposed to that laid down in the case reported in Volume IX of the Weekly Reporter. The contention is that the ruling in that case is to the effect that the plaintiff is to recover mesne profits with reference to the mode in which he occupied the lands at the time of his dispossession.

For my part I think that this is exactly the mode in which the Moonsiff has awarded mesne profits in the present case. He finds that the plaintiff sometimes cultivated the lands himself and sometimes through tenants. In the absence of any thing to show that this was land ordinarily let out to a tenant, he has given the plaintiff the benefit of that mode of holding which appeared most profitable to him; and in so doing, I think he only did justice to him as against the defendant who was a mere wrong-doer. If the latter really believed that a larger amount had been awarded to the plaintiff as mesne profits than had been actually obtained by himself from the land, he would doubtless have brought forward his papers and accounts to show what the actual yearly out-turn had been.

For these reasons, I would dismiss this appeal with costs.

Paul, J.—I am entirely of the same opinion.

It is a misconception of the first of the case cited to say that the present case is governed by it. In that case, it was held—and as I think it was very properly held—that you cannot make a fresh case by taking evidence in execution of a decree. But it was not intended that it should be decided that the subject-matter of a decree was not to be identified by all proper means.

The next point for which the learned pleader for the appellant has contended is one which receives some support from the ruling in the decision referred to in Volume IX Weekly Reporter, and I agree with him that having regard to that ruling, it is somewhat difficult to say how and on what principle damages are to be assessed and awarded in cases like the present. Having said this much, I will not argue the point further. But I would observe that the case in IX Weekly Reporter is an exceptional case, and the circumstances in it are somewhat peculiar and therefore we must not hope to glean from it any principle which can assist or guide us in disposing of the present case. However as the pleader has said that we ought to lay down some definite and distinct rules for the assessment of mesne profits in

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cases like the one which is before us now, I will refer to a case which is reported at page 203 of Marshall's Reports, in which it is laid down by our Officiating Chief Justice with remarkable clearness and precision as follows :—" The right of the true owner " is to all the profits of the land, and not " merely to the amount of the cash collec- " tions during the time that he is illegally " kept out of possession. Indeed, if that " were not so, the rightful owner would get " nothing from a defendant who had occu- " pied and cultivated the land and taken the " profit of it with his own hand. * * " * * Again, if the trespasser has " chosen to remit rent or neglects to make " the collections, so that the rent cannot be " recovered by the rightful owner when he " regains possession, he cannot by such con- " duct lesson his responsibility. This " amounts to no more than saying that he " cannot in fact, by giving it away or other- " wise, dispossess or deprive the true owner " of the property of which he had wrong- " fully possessed himself."

Now this is a correct proposition of law put forward in very simple and clear language. In the same case Mr. Justice Steer enunciates the rule in these words :—" The " great principle to bear in mind is to take " from the debtor every fraction which he " himself realized, and to give credit for " every thing for which he is entitled to " credit ; such, for instance, as rents paid and " charges for collection."

Considered from the point of view disclosed in the case last cited, the computation of wassilat need not be attended with any difficulty.

In the present case, I would observe that it is a good and wholesome presumption of law to presume every thing against the wrong-doers ; and the evidence in the case warrants the conclusion arrived at by the lower Courts. The only way in which the effect of the evidence which has been adduced by the plaintiff could have been impaired or met would have been by the production of the defendant's books and account-papers, and can I believe that if the Ameen had awarded more than the defendant had actually received he would not have produced his collection papers and accounts ?

When an individual can show clearly and distinctly through the medium of matters such as account-books what has been his actual net profits, and he does not do so, every fair presumption arising on the evidence adduced must be made against him.

The appellant's pleader argues that his client is entitled to some consideration at our hands owing to the heavy amount of wassilat decreed. I ask what consideration is a man entitled to who, having evidence in his power to produce, keeps back that evidence ? I answer none.

For these reasons, I agree with my learned colleague in dismissing the appeal with costs.

The 21st July 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent in excess of assets—Suit by Putneedar—Jurisdiction.

Case No. 67 of 1871.

Regular Appeal from a decision passed by the Assistant Commissioner of Manbhoom, dated the 29th December 1870.

Rajah Nilmoney Singh Deo (Defendant) *Appellant,*

versus

Sharoda Pershad Mookerjee (Plaintiff) *Respondent.*

Baboos Oopendro Chunder Bose and *Bhowanee Churn Dutt* for Appellant.

Baboos Sreenath Doss and *Bipro Doss Mookerjee* for Respondent.

There being a deficit in the assets, a putneedar brought a regular suit against his zemindar and obtained an abatement of jumma to the extent claimed. This decree was confirmed in appeal. The zemindar, however, instituted a suit for the whole rent without deduction and obtained a decree while the civil suit of the putneedar was pending, and realized the sum decreed by execution against immoveable and other properties of the putneedar. The latter then sued the former to recover the excess rent, with interest, realized in these executions.

Held that this suit ought to have been brought in the Civil Court.

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Kemp, J.—THE defendant in this case is the appellant. The plaintiff obtained a putnee from the defendant at an annual jumma of rupees 6,720-15-14-2 cowries. It appears that there was a deficit in the assets, and to obtain a remission from the jumma to the extent of rupees 1,924-1-1 cowrie the plaintiff brought a regular suit against the defendant and obtained a decree granting an abatement or reduction of rent to the above extent. This decree was confirmed by the High Court on the 4th of September 1868; but the defendant, the zemindar, sued for the whole rent of 1267 and 1268 without giving the plaintiff any deduction on account of the deficiency in the assets and obtained a decree while the suit for abatement in the Civil Court was pending, and in execution of that decree the defendant, the zemindar, recovered rupees 9-4 annas by the sale of moveable property and rupees 5,500 out of the sale proceeds of the lot brought to sale by him in September 1867, and the balance that remained unsatisfied was deducted on the 21st Assin 1276 from the amounts of other decrees of which the plaintiff took out execution against the Rajah defendant. The plaintiff, therefore, alleging that the Rajah, the defendant, had unjustly received an excess of rent from him amounting with interest to the sum of rupees 8,388-13-10, namely, on account of the year 1267, principal, rupees 1,911-12-15-1, interest realized rupees 1,938-8-6, or a total of rupees 3,850-5-1-1; and on account of the year 1268, rupees 1,924-1-1 principal and interest rupees 1,720-1-17, or a total of rupees 3,644-2-17-4, making a grand total of rupees 7,494-7-18-2 cowries; to which must be added the interest on this total amount from the 13th of Assin 1275 to the 10th of Assin 1277, or rupees 894-5-16-2; and the suit is therefore brought to recover a total sum of rupees 8,388-13-10.

The written statement of the defendant was,—1st, that the suit is not cognizable by the Revenue Court; 2nd, that the suit being brought virtually to reverse a previous decision of the Revenue Court, that therefore the principle of *res-adjudicata* applies; 3rd, that the suit is barred by limitation under Section 30 Act X of 1859; and on the merits with reference to the question of interest that no interest ought to be awarded.

The lower Court has given the plaintiff a decree in full with costs and 5 per cent. interest. On the question of jurisdiction, the decision of the lower Court is a very brief one. It simply alludes to a precedent of this Court and holds that the suit is one cognizable under Act X, and with reference to limitation holds that the suit is not barred.

We think that looking to the rulings which have been quoted by the pleader for the appellant,—to be found in Volume II, Weekly Reporter, page 92, Volume X, page 4, and in the Gap Number, page 53,—that the Revenue Court had no jurisdiction in this case. The decision which has been quoted on the other side in Volume XI, Weekly Reporter, page 413, was a reference to this Court by the Judge of the Small Cause Court of Kishnaghur. In that case the judgment of the High Court was delivered by the late Chief Justice Sir Barnes Peacock. He said that it appeared that the Judge had no jurisdiction in that particular case; that if the suit did lie at all, it would be for the recovery of an illegal exaction of rent; and that the suit would therefore lie in the Revenue Court and not elsewhere. Now in that suit the pottah was before the Court and the terms of the pottah and kubooleut are set forth in the case submitted by the Small Cause Court of Kishnaghur. That reference referred to a case in which the land fell short by a considerable amount of the quantity specified in the lease. There had been a verbal promise that a reduction should be made in the rent for any such deficiencies, and there had been a clear breach of that promise, and the plaintiff had also obtained in the Revenue Court a decree for abatement of rent under Act X. In this case, the pottah and kubooleut are not before us, and therefore we are not able to ascertain what the terms were on which this lease was granted. It appears only that there was a deficiency in the assets, and the plaintiff obtained a decree for an abatement of rent. This suit is, therefore, brought not for the recovery of an illegal exaction of rent, but for the refund of the difference between the jumma stated and the assets which were established on enquiry, that is, for the refund of the amount paid in excess of the real assets of the estate leased, under a decree of the Civil Court. Therefore, applying the rulings in Volumes II, X, and the Gap Number of the Weekly Reporter already quoted, we think it clear that this suit ought to have been brought in the Civil Court. It is not necessary for us to go

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into the other points whether the suit is barred or not: that question will be decided if the plaintiff thinks proper to bring a suit in the proper Court. This appeal must, therefore, be decreed and the decision of the lower Court reversed with costs.

The 25th July 1871.

Present:

The Hon'ble G. C. Paul and W. Ainslie, *Judges.*

Heba-bel-ewaz—Mahomedan Law.

Case No. 246 of 1870.

Regular Appeal from a decision passed by the second Subordinate Judge of 24-*Pergunnahs, dated the* 10*th August* 1870.

Solah Bibee (Pauper Plaintiff) *Appellant,*

versus

Keerun Bibee and others (Defendants) *Respondents.*

Baboo Omesh Chunder Banerjee and *Mohinee Mohun Roy* for Appellant.

Mr. C. Gregory for Respondents.

A Heba-bel-ewaz differs from an out-and-out sale as well as from a gift, while it partakes of the character of both, and if supported by sufficient consideration is binding under the Mahomedan law upon the heirs of the party executing such deed.

Paul, J.—In this case, Solah Bibee, one of the daughters of Cheerunzebe Khan, sued for her share in the property of her deceased father on the ground that her father died possessed of the property mentioned in the schedule annexed to the plaint; and that the defendants withheld possession of her share in the said property. The defendants resisted her claim upon the ground that her father did not die possessed of the said property; because in his lifetime on the 12 h Srabon 1265 he made a Heba-bel-ewaz in favour of his wife, the first defendant, and another Heba-bel-ewaz in favour of his three grand-children whose father had died during his lifetime.

The lower Court held that these two deeds were proved; and that the property mentioned therein should be excluded from that which formed the property of the deceased at the time of his death, and, therefore, from the subject-matter of inheritance to which the plaintiff was entitled to succeed.

Against this decision, an appeal has been preferred to this Court on the part of the plaintiff; and two points have been urged in support of it. Firstly, it is said that the finding of the lower Court as to the genuineness and authenticity of the two deeds is not correct; and secondly, it is contended that, even assuming that the deeds were genuine, they could have no operation because the possession of the property was not delivered over by the deceased to the respective parties in whose favour the deeds were executed.

On the first point, it is only necessary to say that we consider that the decision of the Subordinate Judge is a very careful and able one. He believes the evidence of the witnesses who have been called to prove the execution of the deeds; and nothing has been said in the argument of this appeal to make us distrust that evidence or to induce us to think that the finding of the Subordinate Judge upon this point is not correct.

There is one specific point in the case put forward before the Court with great ingenuity and a certain amount of ability by Baboo Omesh Chunder Banerjee, namely, that inasmuch as there is no provision in the Heba-bel-ewaz for the fourth grand-son who was newly born, the theory of the Subordinate Judge that the deceased ancestor executed the deed with a view to make provision for his grand-children does not hold good. But whatever strength this argument may possess, it is not, we think, of such weight as to justify us in setting aside the well-considered and able judgment of the Subordinate Judge.

Baboo Mohinee Mohun Roy who followed Baboo Omesh Chunder Banerjee felt the difficulty of assailing the decision of the lower Court upon the facts of the case, and he therefore very properly confined himself to the point of law, *viz.*, that as after the execution of the deeds the deceased ancestor continued in possession of the several parcels of property in dispute, the deeds must be regarded in the light of wills, and should not be held to operate as gifts according to Mahomedan law; and further that if there

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had been any disposition of property under the deeds in question, the transaction was merely nominal and colorable, and could not possibly be put forward to deprive the heirs who are legally entitled to succeed to the property.

First of all we will consider whether this was a colorable transaction or not. Some evidence has been offered to prove that the ancestor was in possession of the property until the time of his death, and no doubt the circumstances of the ancestor's having continued to remain in possession for a great number of years after the execution of the deeds, may raise a suspicion as to the *bona fides* of the transactions; but that is not the complexion of this case. It is no where suggested that the transactions were colorable. The case is one in which one party says that the grand-father never made these gifts; and the allegation on the other side is that he did make those gifts. Now, it is clear that the father of these boys (the grand-children) died in the lifetime of the ancestor; and as by Mahomedan law these boys would not be his heirs, it may very well be that the deceased thought it proper to make some provision for them, so that on his death they might not be destitute. Having regard to the natural affection which the grand-father had towards his grand-children, and bearing in mind that the deed executed in their favour recites that the deceased was indebted to their deceased grand-mother in a large sum of money in respect of her dower, it appears to us there is sufficient consideration on the face of the deed to support it as a Heba-bel-ewaz under the Mahomedan law. Similarly, with regard to the deed executed in favour of the female defendant, there is sufficient on the face of it to support it as a Heba-bel-ewaz. Such a transaction is different to an out-and-out sale, and it is also different to a gift. It partakes of the character of both. There is nothing in the deed about the management of the property. It is clear, therefore, that the donor must have intended to remain in possession during his lifetime for the benefit of his grand-children and their mother. It is sufficient to say that these documents are deeds of Heba-bel-ewaz according to Mahomedan law, and as there is no contention put forward against the truth of the recitals made therein, we may take it that those recitals are correct and binding upon those who claim through the deceased.

Under these circumstances, and having regard to the decisions reported in the first Select Reports, page 31, and X Weekly Reporter, page 25, Privy Council Rulings, we consider the property in suit passed by virtue of these documents to the grand-sons and their mother respectively. Therefore, upon the whole, we are of opinion that the defendants have made out a sufficient case. But inasmuch as the deceased ancestor had been in possession of the property in his lifetime, it may be said that the plaintiff was justified in bringing the suit. Such being the case, while we affirm the decision of the Court below, we think that each party should pay his own costs.

The Government will recover the stamp duty from the plaintiff.

The 25th July 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Section 27 Act VI of 1871—Transfers—Jurisdiction.

Case No. 164 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rajshahye, dated the 27th March 1871.

Gujendro Chunder Sandyal, *Appellant,*

versus

Wooma Moyee Debia, *Respondent.*

Baboos Mohinee Mohun Roy and *Kashee Kant Sein* for Appellant.

Baboo Doorga Mohun Doss for Respondent.

A Judge has no power to keep a case on his own file and refer the witnesses to be examined some by the Moonsiff and some by the Subordinate Judge, and then to decide it himself.

Mitter, J.—We are of opinion that the proceedings held by the lower Court in this case are altogether illegal. It appears that the parties produced their witnesses before

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the Judge, and the Judge referred them to the Subordinate Judge for examination. The Subordinate Judge having examined some of the witnesses, reported to the Judge that he could not proceed with the examination of the other witnesses, inasmuch as the *sal-tamamee* or end of the year for annual statements had drawn near. The Judge then ordered the Moonsiff of the district to examine the remaining witnesses; and it is upon the evidence of witnesses thus taken, partly before the Subordinate Judge and partly before the Moonsiff, that the Judge has ultimately decided the case rejecting the application made to him by the applicant. The proceedings held by the Judge are altogether unsupported by law. The Judge could have transferred the case either to the Moonsiff or the Subordinate Judge with the sanction of this Court under the provisions of Section 27 Act VI of 1871, but he had no power whatever to keep the case on his own file and refer the witnesses to be examined, some by the Moonsiff and some by the Subordinate Judge, and then to decide it himself. The evidence taken in this manner can never lead to a satisfactory decision, and it requires no argument to prove that such evidence is not even legally admissible.

We, therefore, quash the proceedings held by the lower Court and direct that Court to try the case *de novo* without any delay. An English precept returnable in one month to issue. The costs of this appeal and of the lower Court will abide the ultimate result.

The 25th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Enhancement of rent—Talookdar—Jurisdiction—Rates.

Case No. 219 of 1870 under Act X of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Tipperah, dated the 30th July 1870.

Rowshun Bibee (one of the Defendants) *Appellant,*

versus

Chunder Madhub Kur (Plaintiff) *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Kalee Mohun Doss, Doorga Mohun Doss and *Rash Beharee Ghose* for Respondent.

A suit against a talookdar for arrears of rent at an enhanced rate would, under Act X of 1859, lie in a Revenue Court even though it were not brought for determination of the rate of rent at which defendant should be required to give a kubooleut.

In fixing the prevailing rate of rent of a talook it is an error to strike an average between the statements of witnesses on opposite sides: the proper plan is to ascertain on which evidence reliance can be placed.

Jackson, J.—This was a suit for enhanced rent. The plaintiff alleged that the defendant was a talookdar in his zemindaree; that settlements had been made with her up to the year 1277; that notice had been served upon her for enhanced rent for the year 1278; that the defendant had not entered into any settlement, and therefore this suit was preferred. The defendant contested the action on several grounds. The Deputy Collector of Tipperah was, however, of opinion that the plaintiff was entitled to an enhanced rent which he fixed, on the grounds stated by him, at Rs. 3,625-4.

The defendant has appealed from this decree.

It is first urged for the defendant that such a suit, not being a suit for the determination of the rate of rent at which the defendant should be required to give a kubooleut, will not lie in the Revenue Courts. It is somewhat late to urge such an objection. Numerous suits of this description have been preferred in the Revenue Court since the passing of Act X of 1859. It is in fact a suit for arrears of rent at an enhanced rate. It has, therefore, been properly brought in the Collector's Court.

It is then said that the ground upon which the enhanced rate is demanded has not been proved. That ground is that it is the custom upon which the rents of this talook and similar talooks have been fixed to ascertain the rate of rent which is paid for the differ-

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ent descriptions of lands in the talook, and, allowing a deduction for all lakheraj lands and 20 per cent. for the talookdar's profits and collection charges, to fix the balance as the rent of the zemindar. It is stated that there is no proof that only 20 per cent. is deducted on this latter account. But we find that the dowls of settlement given by the defendant in former years proceed upon this calculation. In each of them a deduction is made of 20 per cent. in favor of the talookdar on account of his profits and collection expenses, and the remainder is declared to be the rent payable to the zemindar.

But it is contended that there is no evidence upon the record from which it can be ascertained what amount is actually paid by the ryots on the estate; that the evidence as to the prevailing rate which is given by the witnesses for the plaintiff and the defendant is conflicting; and that the Deputy Collector has been wrong to strike an average rate between the statements of the one side and of the other. There is certainly some difficulty upon this point. The proper course for the plaintiff to have adopted would have been to require the defendant to produce the zemindaree papers of his office to prove what was the amount actually collected from the ryots. For the plaintiff we are told that such papers are in the possession of the defendant, and that if the defendant wished to have the calculation based upon them she might have produced them. But it is clear that the defendant was not called upon to produce these papers, and it is not probable that the defendant would of her own accord assist the plaintiff to enhance her rent. We have considered the evidence which has been offered upon both sides as to the prevailing rate of rent, and agree with the appellant that the Deputy Collector has been in error in striking an average between the witnesses on both sides. His proper plan was to ascertain upon which evidence reliance could be placed. But the evidence itself even of the plaintiff's witnesses is of that indeterminate description that it is impossible to ascertain from it what is the exact amount paid by each class of ryots for the lands they cultivate and dwell in. It seems to have been admitted in the lower Court that a large quantity of uncultivated land has been brought into cultivation since the last settlement was entered into. And there is some evidence proving that a higher rate of rent for cultivated lands has been demanded from the ryots since that settlement. It is in evidence also that the talook of the defendant extends only to 10 annas of the lands comprised in the talook, and that the remaining 6 annas of the lands constitute a separate talook, the rent of which in an enhancement suit was fixed at rupees 1,500. The lands of the two talooks are ijmalee, each talookdar obtaining his share of the rent of the ryot in the proportions of 6 annas and 10 annas. We think that the evidence in this case sufficiently bears out that the lands are paying the enhanced rent which was in that suit decreed against the talookdar who holds the land ijmalee with the defendant. The settlement with that talookdar was entered into some years ago, and there is no assertion that it has been found to be unfair or inequitable or such as he cannot or does not pay. In the absence of certain evidence of what the actual receipts from the talook amount to, we think that the proper course is to require the defendant to pay an amount of rent equivalent to that which is paid by her co-talookdar.

We, therefore, modify the decision of the Deputy Collector and decree to the plaintiff a rent of rupees 2,500 for the year 1278, with interest at 12 per cent. from the date on which the suit was determined by the Deputy Collector to the date on which it is paid.

Looking to all the circumstances of this case, we direct that each party shall pay his and her own costs.

An objection has been taken against a decree being passed in this case for the rent of the whole talook against Rowshun Bibee, on the ground that one Moonshee Hossein Ali is the proprietor of 1 anna 11 gundah 1 kaug 2 dunt share. But there is no evidence to prove that he is the registered owner of that share or that he has paid rent separately for that share to the zemindar. The decree must, therefore, stand against Rowshun Bibee and against her alone.

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The 25th July 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Hindoo law—Adoption—Custom.

Case No. 227 of 1870.

Regular Appeal from a decision passed by the First Subordinate Judge of Gya, dated the 19th September 1870.

Luchmun Lall (Defendant) *Appellant,*

versus

Mohun Lall Bhaya Gayal and another (Plaintiffs) *Respondents.*

Baboos Unnoda Pershad Banerjee, Kalee Prosunno Dutt and *Mohinee Mohun Roy* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Respondents.

The performance of the *putrestee jâg* is essential to the validity of an adoption in the Duttaka form, at least among the three superior castes.

The consent of the party adopted is essential to the validity of an adoption in the Kritima form.

According to Hindoo law, in order that a custom may have the force of law it must be shown to have existed from time immemorial.

Mitter, J.—THE facts of this case are fully set forth in the order of remand of this Court, dated 22nd June 1870.* We therefore think it unnecessary to repeat them here.

The first question we have to determine is whether the adoption relied upon by the defendant is legally valid or otherwise.

We are of opinion that this question ought to be answered in the negative.

The defendant has produced no evidence, oral or documentary, to prove the permission alleged to have been given by the husband of his adoptive mother, nor has he given any proof whatever of the performance of the *putrestee jâg*, which is essential to the validity of an adoption in the Duttaka form, at least among the three superior castes to one of which he belongs. It is, therefore, clear that the title set up by him must fail according to the ordinary rules of Hindoo law applicable to the subject.

It has been argued, however, that the mode of adoption resorted to in this case is the customary mode prevailing among the Gayals, the class to which the parties admittedly belong; and as immemorial custom has under the Hindoo Shasters the full force of law, the Court is bound to recognize the adoption as valid.

We are of opinion that there is no satisfactory proof of the existence of any such custom. The witnesses examined by the defendant speak to no less than four different customs; but their evidence is too vague and unsatisfactory to be relied upon.

In the first place, it is impossible to make out from their depositions whether the different customs referred to by them prevail in different Gayal families, or whether they prevail, each and all of them, among the whole tribe of Gayals. In the former case, there is no evidence whatever to prove that the mode of adoption resorted to in this case was the customary mode prevailing in the family of the adoptive mother of the defendant, and in the latter case the custom relied upon would be altogether wanting in that element of certainty and continuity which is absolutely essential to its validity.

In the next place, it is clear that these so called customs are all of them opposed to the positive injunctions of the Hindoo law, and the Court is therefore bound to require their existence to be proved beyond all reasonable doubt before it acts upon them as having the force of law. No such proof has been given in this case. The oral evidence is extremely vague and meagre, and the only document produced consists of a very recent decision of the Judge of Gya which does not appear to have been passed after a strictly judicial enquiry.

Again, according to Hindoo law, in order that a custom may have the force of law, it must be shewn to have existed from time immemorial. The evidence is singularly defective on this point. No cases of ancient adoption have been mentioned by the witnesses, and although two of them have generally stated that the customs deposed to by them have been in existence since the

* 14 W. R., p. 73.

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dawn of their reason, we are by no means prepared to place any reliance upon such a vague statement, wholly unsupported by details to test its truth. We may further remark that the decision of the Judge of Gya is altogether silent on the length of time for which the customs referred to therein have been in existence.

It has been further argued that the Court is bound, at any rate, to recognize the adoption set up by the defendant as a Kritima adoption. This objection also is of no force whatever. It was never raised in the Court below, and it is clear from the concluding paragraphs of the defendant's own written statement that this was not the case he intended to rely upon. Moreover, there is no proof whatever that the defendant was a consenting party to the adoption, and it is a settled rule of Hindoo law that such consent is essential to the validity of an adoption in the Kritima form.

Holding, therefore, that the title set up by the defendant absolutely fails, it is unnecessary to express any opinion on the other point which was raised before us in the course of the argument, namely, whether the property inherited by Inder Koonwur from her brother became her *streedhun* under the Hindoo law administered in the Benares school; for the plaintiff would be entitled in our view to succeed to that property, whether as the nearest heir of Inder Koonwur's brother or even as that of Inder Koonwur herself, the defendants being in no way related to either of those individuals.

For the above reasons, we dismiss this appeal with costs.

The 26th July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Registration—Rules by Registrar General—Section 80 Act XX. 1866—Construction of Section 30—Executants.

In the matter of

Ram Chunder Biswas, *Petitioner.*

Baboo Huree Mohun Chuckerbutty for Petitioner.

Section 80 Act XX of 1866 in no way empowered the Registrar General to pass any rule directing by what particular description of evidence a person producing a deed to be registered shall prove his right to have it registered; nor could it empower him to frame a special law different from the ordinary law of evidence as to what fact shall be proved by oral and what by documentary evidence.

Where all the executants of a deed admit before the Registrar General that they have executed the deed, that officer has nothing to do with the recitals of the deed, or with its possible operation as regards third parties, *e. g.*, a minor whose rights are reserved in the deed.

The representative, assign or agent mentioned in Section 36 means the representative, assign or agent of one of the executants of the deed.

Jackson, J.—THIS is an application to this Court to enforce the registration of a certain deed of sale, the registration of which was in the first instance refused by the Sub-Registrar of Sylhet, and subsequently virtually refused by the Judge of Sylhet. In fact the Judge ordered its registration, but upon receiving a communication from the Registrar General, the Judge replied that he had been in error in passing the order for registration and that the Registrar was at liberty to decline carrying out the order.

There seems to us to be absolutely no reason whatever for refusing to register the document. It was a deed of sale purporting to be executed by three persons for themselves and by one of those three on behalf of a minor whose guardian he alleged himself to be. The deed alludes to the guardian who shall be personally responsible for all damages in case of such refusal.

The Registrar refused to register this deed of sale, because the alleged guardian of the minor did not produce the appropriate legal document to prove that he was the guardian of the minor, in accordance with rule 44 of the rules framed by the Registrar General under Section 80 Act XX of 1866. That Section gives power to the Registrar General to frame from time to time rules consistent with the Act for different purposes, and amongst other rules for regulating the proceedings of the Registrars and Sub-Registrars under him, and declares that the rules so framed shall, after approval by the Local Goverment and publication, have the same force as if they were contained in the Act. Rule 44 of these rules lays down that the right to appear by the guardian of a minor as the representative of such minor shall be proved by the appropriate legal document, and the context would show that it is not sufficient that the fact of his being the guardian shall be proved by any other evidence. The Judge, considering that this rule is a portion of the Act, has declined to direct registration of the deed because

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the appropriate legal document has not been produced.

It seems to me that the 80th Section in no way empowered the Registrar General to pass any rule directing by what particular description of evidence a person producing a deed to be registered shall prove his right to have it registered. The description of rule which is alluded to in the 80th Section is evident from the special clauses of that Section, *viz.*, rules for the custody of books and destruction of papers and the language to be used, holidays to be observed, &c., &c., and generally for regulating the proceedings of the Registrars and Sub-Registrars under him. This final clause must be held to allude to matters of the same description as are mentioned in the above clauses. It cannot empower the Registrar General to frame a special law different from the ordinary law of evidence in force in all the Civil Courts of the country as to what particular fact shall be proved by oral and what by documentary evidence. The guardian of a minor can institute a civil suit in behalf of a minor without any appropriate legal document. He is of course required to prove that he is the guardian of the minor, if there is any dispute upon the point. But the fact can be proved by oral as well as documentary evidence. Every guardian in this country is not expected to hold documentary evidence to prove that he is the guardian of a minor. A father is the guardian of his own children, but he does not hold documentary evidence to prove the fact. A father would be allowed to sue on behalf of his children without any legal document. It is remarkable that he cannot execute any deed in their behalf without a legal document to prove that he is their guardian. The refusal to register in reality amounts to a refusal to allow him to execute any deed, inasmuch as the deed is invalid without registry.

We think, then, that rule 44 of the rules passed under Section 80 Act XX of 1866 laying down by what evidence a guardian shall prove that he is the guardian of a minor is a rule beyond the authority of the Registrar General to pass under that Section. It is not a rule merely regulating the proceedings of Registrars and Sub-Registrars, but it is a rule setting aside the ordinary rule of evidence which is the law of the country. It follows that the rule has no force.

We are of opinion that the Judge of the District Court is bound to direct the registration of this deed notwithstanding this rule, if the guardianship of the minor is proved before him.

I agree also with my learned colleague that in the present instance, as all the three executants of the deed had admitted that they had executed the deed, and as the rights of the minor were distinctly reserved in it, there was no necessity for any further enquiry as to whether one of the executants was the guardian of the minor or not.

We think that the Judge should carry out his original order directing that the deed in question shall be registered.

Mookerjee, J.—I am also of the same opinion. I wish merely to add that as all the parties to the deed in question by whom it purports to have been executed had appeared before the Registrar and admitted the execution of the deed, the Registrar to whom the same was presented for registration had nothing whatever to do with the recitals of that deed or with its possible operation as regards parties who do not purport to execute it and who must therefore be considered as third parties.

If the Registrar finds that all the executants of the deed admit the execution, his duty is clear, that is, he must register the deed.

In this case the parties who actually executed the bill of sale were three in number, Ram Kant Deb, Joogulkishore Deb, and Kalee Nath Deb. These three executants had appeared before the Registrar and admitted the fact of the execution. I think, therefore, the Registrar was bound to register the instrument. He was not competent to inquire whether any other person than those who purport to execute it is or is not bound by it.

In the body of this deed one of the executants conveys not only his share but the share of his minor brother in the property. The executants then covenant that if the minor coming of age dispute the sale of his share, Kalee Nath and others will pay to the purchaser a certain sum of money as damages. The recital cannot bind the minor who has not executed the deed. He is in no way affected by the registration, because the deed on the face of it does not appear or profess to have been executed by him.

Section 36 of Act XX of 1866 enacts that " no document shall be registered under " this Act unless the persons executing such

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"document or *their* representatives, assigns "or agents authorized as aforesaid, appear be-"fore the registering officer. He shall there-"upon inquire whether or not such document "was executed by the *persons* by whom it "*purports* to have been executed, and in "the case of any persons appearing as a "representative, assign or agent, satisfy him-"self of the right of *such person* so to ap-"pear."

In this case the document does not *purport* to have been executed by the minor Redoy Chunder Deb, and no person therefore is required to appear before the Registrar as *his* representative, assign or agent. The deed purports to have been executed by three persons, and all those three persons had appeared personally before the Registrar and admitted the execution of it.

The representative, assign, or agent mentioned in this Section appears to me to mean the representative, assign, or agent of the party who is one of the executants of the deed.

A man may execute a deed and state in it that he is selling his portion of the property as well as the portion of another individual to whom he stands in a fiduciary relation, but only signs his name. What the Registrar, I think, is required by law to inquire in such a case is whether the deed is executed by that person or not. He has no business to inquire what actually passes or should pass under such a document, or whether the interest of any third person is affected by it. He cannot, I apprehend, assume the functions of a Civil Court and inquire into the possible effect or operation of such a document. If the minor coming of age choose to dispute the right of his brother to sell his share of the property, and question also his right to be his guardian, the Civil Court may require the alleged guardian to prove his authority. But no precise nature of the evidence which would be then required to substantiate the fact of the guardianship is laid down in any law. The Civil Court is competent to be satisfied by oral testimony if it believes that evidence and to say on the strength of it simply that the brother was the legal or natural guardian of the minor.

The Registrar General is not competent to prescribe rules of evidence for the guidance of the Civil Court. I think, therefore, that the Registrar General is wrong in laying down that only "appropriate legal documents" can be adduced to prove a guardianship. I am also of opinion that under Section 80 of the Registration Act, the Registrar General was not competent to lay down any rule of evidence and direct his subordinates and the District Judge to obey his law of evidence.

I would agree in holding that in this case the Registrar as well as the Judge was wrong in refusing to register the deed which they were bound to register.

The effect of the refusal to register would make this deed inadmissible in evidence in any Court of Justice. The consequence in the present case would be that though the three executing parties admit the due execution of the bill of sale by them, the petitioner would be deprived of the benefit of his purchase even from them. This is manifestly unjust and against the object and provision of the Registration Law.

The 26th July 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

"Summary" proceedings—Section 22 Act XIV. 1859—Limitation.

Case No. 133 of 1871.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 3rd February 1871, *affirming an order of the Deputy Commissioner of Hazareebagh, dated the 22nd July* 1871.

Tekayet Roop Mungul Singh (Judgment-debtor) *Appellant,*

versus

Tekayet Chooramun Singh (Decree-holder) *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A judgment-creditor having in execution taken possession of lands in excess of his decree, objection was raised and a case instituted in which adjudication was made in favor of the judgment-debtor; the order for

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restoration of the excess land being confirmed in appeal.

HELD that this order was not a summary one within the meaning of Section 22 Act XIV of 1859, and that an application for its execution was governed by the three years' limitation.

Kemp, J.—WE think that this appeal must be dismissed. The question before us is whether Section 22 of Act XIV of 1859 applies to this case or not. It appears that the decree-holder, respondent, was judgment-debtor in a decree obtained by the special appellant. In execution of that decree the special appellant took possession of lands in excess of his decree. On an application by the special respondent, objecting to these proceedings on the part of the decree-holder, a case was instituted and it was found that the decree-holder had taken in execution lands in excess of those covered by the decree, and there was therefore an adjudication in favor of the judgment-debtor, special respondent before us, in January 1867, ordering the restoration of the excess lands so taken, and this order was confirmed on appeal up to this Court, the decree of the High Court being passed in September 1868. It is now contended that the present application is barred, because the order was passed more than one year next preceding the date of the application for such execution.

Both Courts have found that the application was in time. On referring to a decision to be found in Volume V, Bengal Law Reports, page 162,* in which several cases were referred to, and in which the Chief Justice delivered the judgment of the Full Bench, it was held that it was very difficult to lay down any clear rule as to the meaning of the word "summary;" but in that case before the Full Bench it was held that it was impossible to say that the proceeding in that case was a summary one within the meaning of Section 22, inasmuch as it was an order made by a Court in the exercise of its jurisdiction in the execution of the decree in a suit. The same remarks will also apply to the present case which refers to an order passed in execution of a decree by a Court having jurisdiction to pass it. We, therefore, think that Section 22 Act XIV of 1859 does not apply, and that the three years' limitation applies; and applying that period, it is admitted that the present application for execution is in time.

The appeal is dismissed with costs.

13 W. R., F. B., p. 74.

The 27th July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court—Alteration of names of parties.

Case No. 760 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 28th December 1870, *affirming a decision of the Subordinate Judge of that District, dated the 26th March* 1870.

Bal Gobind Tewaree (Plaintiff) *Appellant,*

versus

Hureenath Pershad Sahoo (Defendant) *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Aubinash Chunder Banerjee* for Respondent.

An Appellate Court has no authority to strike out a respondent's name, and in lieu of it to make other parties defendants and then send the case down to the lower Court for re-trial as against those parties.

Glover, J.—THE circumstances of this suit are as follows. It is as well to give them in order to understand the position taken by the Judge in deciding the case. In 1869, the plaintiff, Mussamut Luchmee Koowur, brought a suit for adjudication of her title to a one-third share of Tolah Hadee Khan against three persons, namely, Hureenath Pershad, Jowahir Lall, and Ram Golam Singh. These were the owners of the adjoining estate, mouzah Talmapore. It appears that the Collector had ordered a butwarah to be made of Tolah Hadee Khan as being a part of mouzah Talmapore, and the object of the suit was to have it declared that this Tolah Hadee Khan did not belong to the mouzah of the defendants. The Court of first instance dismissed the plaintiff's claim on the merits, and while the case was pending in appeal before the Judge, it

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appears that a decision of the High Court had already decided that Hureenath Pershad had no claim to any part of mouzah Talmapore. On this, as the Judge says, the vakeel for the appellant admitted before him that he could not carry on the appeal as it stood, inasmuch as the defendant, respondent Hureenath Pershad, had been declared by the High Court to have no interest in the property which the plaintiff sought to recover. The Judge goes on to say that the vakeel after making that admission petitioned that the suit might be remanded to the Court of first instance, with instructions to the Subordinate Judge to make Bikurmajeet Lall, the purchaser at auction and Saligram Sahoy and Ruchia Ram, the zur-i-peshgeedars, defendants in the suit, and after receiving evidence to give a fresh decision. The Judge refused to do this, saying that he was not competent under the law, in the appeal stage, to send back a case to the lower Court for re-adjudication under such circumstances.

It is against this order that the present appeal is made. There are two points taken in special appeal; 1st, that the Judge has misunderstood the application of the plaintiff's vakeel asking that the auction-purchaser and the zur-i-peshgeedars be made parties to the suit under Section 73; and 2ndly, that the Judge was competent under the law to send back the case to be re-considered as the appellant had requested.

As regards the first point, it appears to us that there can be no question whatever, for the Judge speaks of the vakeel's having made the admission before he put in the petition applying to have the auction-purchaser and zur-i-peshgeedars made parties to the case. It is said that the Judge ought not to have attended to the vakeel's representation, and that he was bound to decide the case as it was before him. But how could he do so? If the vakeel admitted that he could not go on with the appeal, the Judge was quite justified in the course which he adopted, for it would have been ridiculous to decide the case on the merits, as if the case had gone in favor of the appellant there was no respondent against whom the decree could have been made.

The second objection seems to us equally untenable. There is certainly nothing in the provisions of Section 73 of the Code of Civil Procedure which gives an Appellate Court authority to strike out a respondent's name and in lieu of it to make other parties defendants in the suit and then send the case down to the lower Court in order that it might be re-tried as against those parties. It is said that under Act XXIII of 1861 the Appellate Courts have the same power as Courts of first instance in this matter; but this is not a mere matter of procedure, and there is no Section of the law that we know of which gives any Court the power to make the alteration which the Judge was required to make. No authority has been shewn to us in support of the contention, and it appears to us inconsistent with the ordinary rules on the subject. According to the pleader's argument, an appellant who has lost his case because he has brought the appeal against a person who has no interest in the estate, and therefore can no longer, except nominally, be called a respondent, is to have the privilege of having the case sent back for trial against other parties without the payment of an institution stamp; and in short to have all that done for him by the Court which he ought to have done for himself in the first instance.

It is further contended that in any case, notwithstanding the vakeel's admission, the Judge was bound to decide the case as against Hureenath Pershad. This objection has been already met by the remarks contained in the first part of our judgment, namely, that the Judge could not proceed with the case on the merits against a party whom the vakeel distinctly admitted had no interest in the subject-matter of the suit.

There is no error in law in the Judge's decision, and we therefore must dismiss the special appeal with costs.

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The 27th July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Tenancy — Holding over — Notice to quit.

Case No. 224 of 1871.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 28th December 1870, *affirming a decision of the Moonsiff of Seetamurhee, dated the 5th September* 1870.

Jumaut Ali Shah (Defendant) *Appellant,*

versus

Chowdhry Chutturdharee Sahee and others (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Chunder Madhub Ghose and *Debendro Narain Bose* for Respondents.

Where a tenant has been allowed to hold over leases on the expiry of their terms, and has continued in possession under those leases, it must be supposed that there is an implied agreement between him and the landlord; and the tenant, under such circumstances, is entitled to hold on until served with a legal notice to quit.

Kemp, J.—THIS is a suit brought under the provisions of Section 53 Act VIII of 1869. The plaintiff is the zemindar. He sues to eject the defendant, whom he admits to be his tenant, on the ground that the defendant has no right of occupancy and therefore he is entitled to eject him.

The defendant's case was substantially this,—that he has been holding the land in suit for more than 12 years; that he could not be ejected from the land; that the plaintiff has not shown that there is any arrear of rent due from him, the defendant, or that the plaintiff holds any unsatisfied decree for rent. In the course of the argument, a plea was also raised on behalf of the defendant in the first Court to the effect that no legal notice had been served upon him to quit.

Both Courts have found that the defendant has no right of occupancy, but there is no decision on the question of notice; but on the one question whether the defendant was able to prove a right of occupancy, the Courts have concurrently decreed that he must be ejected. The Judge says that it is for the defendant to prove that he has an occupancy right; that all he can show is a pottah of the year 1268 and a letter permitting him to cultivate, dated 1274; but that neither of these go back so far as 10 years and that the pottah does not refer to any previous holding or afford any ground for inferring that the defendant held this particular land previous to the issue of the pottah. Then the Judge refers to an admission of the defendant in 1258 (the date referred to by the Judge ought to be 1268) when the ticcadar of this property appears to have charged the defendant with forcibly rescuing some cattle distrained by the ticcadar. In that case, the defendant did certainly state that with the exception of 1 beegah of Fakeeran land on which a mosque had been erected by him he held no other lands; and it further appears that in a suit for damages against the ticcadar, he recovered damages on the ground that he did not hold any other land but the 1 beegah of Fakeeran land alluded to above.

The grounds taken in special appeal are—1st, that no legal notice having been served upon the defendant to quit, the suit of the plaintiff ought to have been dismissed; and in support of this argument, a decision in Volume VII, Weekly Reporter, page 152, by the late Chief Justice Sir Barnes Peacock is quoted.

The second ground taken is that the onus has been wrongly placed on the defendant, as the onus in this case was on the plaintiff.

The third ground is that at all events with reference to the 1 beegah of Fakeeran

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land on which the mosque is built, it is clear that the defendant has proved a right of occupancy. With reference to this last ground, the pleader for the respondent states that his client does not claim to eject the defendant from the 1 beegah odd cottahs of Fakeeran land upon which the mosque is built.

With reference to the second ground, namely, the incidence of the onus, there has been a great deal of argument on both sides, and it proceeded to a considerable length before the Court found out that the point was not raised in the grounds of special appeal, and as the Court intends to decide this case upon the first ground, namely, the absence of legal notice, it is unnecessary for the Court to enter into the question whether the onus has been misplaced or not.

On the first question, namely, whether the land-owner, the plaintiff in the case, has given the defendant a legal notice to quit, we think there can be no doubt that that question must be answered in the negative. It is admitted that this defendant has been holding, the plaintiff says, from 1272: the Judge however finds from 1268. The defendant has been holding under leases which have expired, and on the expiry of the terms he has been allowed by the plaintiff to hold over and has continued in possession under those leases, and the fact that he is the tenant of the plaintiff and that he is in possession is not denied by the plaintiff. Under such circumstances it appears clear that there was an implied agreement between the plaintiff and the tenant, and that the tenant was entitled to hold on until a legal notice to quit was served upon him. As observed by the late Chief Justice in the case above alluded to, if this were not so the land-owner might, under similar circumstances, receive several kists of rent from a ryot, and when the crops were ready to be reaped might turn round and tell the ryot that he was a trespasser and must quit immediately, instead of allowing him to continue until the end of the year and reap the crops; that would be, as the learned Chief Justice says, unjust. His Lordship further goes on to observe that where a land-owner continues to receive rent for a fresh period after the expiration of a lease, he must be considered to have acquiesced in the tenant's continuing to hold upon the terms of the original lease and he cannot turn out the tenant or treat him as a trespasser without giving him a reasonable notice to quit. Now it has been contended for the plaintiff in this case that there has been a reasonable notice to quit given to the defendant; that although that notice is not a written notice, the law does not require a written notice to be given; that he gave the defendant a verbal notice to quit on the 5th of Bysack 1277, and as the suit was not brought until Assar of the same year that was a reasonable notice to quit and the defendant had reasonable time given him. We think that such is not the case. In the plaint it is distinctly stated that a verbal notice was given to the defendant on the 5th of Bysack 1277 to quit as on that date, but no terms are stated and no time mentioned within which the ryot was required to quit; and moreover the plaintiff says that his cause of action arose on the 5th of Bysack 1277, that is to say, on the very day on which he alleges that he gave the defendant a verbal notice to quit.

We, therefore, hold under the ruling already quoted, and looking to the facts and circumstances of the case that this is not a legal notice to quit, and at all events it cannot be said to be a notice to quit within a reasonable time. The suit of the plaintiff must, therefore, be dismissed on that ground alone, with costs of all the Courts.

The 28th July 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Rent suit — Benamee kuboolents — Estoppel—Landlord and tenant.

Case No. 501 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th April 1871, *affirming a decision of the Subordinate Judge of that District, dated the 23rd February* 1871.

Mr. B. Donzelle (Defendant) *Appellant,*

versus

Baboo Kedarnath Chuckerbutty (Plaintiff) *Respondent.*

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Mr. G. Gregory and *Baboo Umernath Bose* for Appellant.

Messrs. H. C. Marindin and *M. L. Sandel* and *Baboo Unnoda Pershad Banerjee* for Respondent.

In a suit for arrears of rent on the basis of a kubooleut which defendant, though not denying its execution, contended was benamee, the real ownership lying with others; the Lower Appellate Court refused to look behind the kubooleut on the principle that a tenant under the circumstances could not deny his landlord's title:

HELD, in pursuance of a view expressed by the Privy Council, that benamee transactions are to be regarded as a recognized system amongst Hindoos, that the Judge ought to have tried the question whether the lessor's title was not merely benamee or fictitious.

HELD that the question should not have been entangled by the technical doctrine of estoppel which should not be applied in this country in the manner in which it is applied in cases governed by English law.

Bayley, J.—I AM of opinion that the judgment of the Lower Appellate Court should be reversed and the case remanded for re-trial.

The plaintiff sued for arrears of rent for the Aughran kist of 1278 on a kubooleut dated the 27th January 1860, executed by one of the former managers of the Toolshia concern in favour of Mussamut Anusul Burkut. Anusul Burkut was one of the wives of Golam Hossein, and is alleged to have been a proprietor of the lands in suit in her own title, and the suit is brought on the basis of the above kubooleut alleged to have been given to her in her own right.

The defendant did not deny the kubooleut relied upon by the plaintiff, but contended that although the kubooleut was executed in favour of Anusul Burkut, yet the real ownership of the mehal leased was with her husband, and after his death the rent was paid to the eldest wife Anusul Burkut not as malik but as the head of the family, and was distributed among all the heirs as sharers. The defendant alleged that about the period of the institution of this suit she obtained a putnee pottah of 15-16ths share of Talook Gungapoor from the heirs of Golam Hossein, the late proprietor, and that therefore the plaintiff was only entitled to the rent of 1-16th share.

The first Court held that Anusul Burkut was the real malik and in possession and in the enjoyment of the rent; that the plaintiff was her putneedar; that when the amulnamah was proclaimed in the Mofussil, the defendant had knowledge of the same, and that therefore the plaintiff was entitled to recover the rent sued for. The Lower Appellate Court without going at all into the question whether the real title was solely with Anusul Burkut or also with the other heirs of Golam Hossein, and if so, to what extent the title of each sharer extended, simply remarks:—"It appears to be unnecessary to enter into "the merits of the question of title raised "by Mr. Gregory. This is a suit for rent "based on a kubooleut executed in favor "of a lady who has granted a putnee of the "estate to the plaintiff. The Court will not "look behind this kubooleut on the principle that a tenant cannot, under the circumstances stated by the learned Counsel, "deny his landlord's title." Upon this view, the Lower Appellate Court dismisses the appeal and decrees the plaintiff's suit.

The plaintiff appeals specially chiefly on the ground that the judgment of the Lower Appellate Court is erroneous in law and defective in investigation in that it has not tried the question as to who the real owner was, and that such defect has affected the case on the merits. Two cases were quoted in the Lower Appellate Court from Weekly Reporter, Volume XIV, pages 121 and 399, but both of them were measurement cases and the question turned on the actual words "as in possession" as used in Act VI of 1862, B. C. The real question in this case is whether the Lower Appellate Court has correctly laid down the principle that it could not go behind the kubooleut. The whole case turned on the question whether the lady Anusul Burkut was the real owner of the land. The Lower Appellate Court begs the question in assuming that she was. This has led the Court to the conclusion that the real title was with her. It is stated that the title of Anusul Burkut arises from a deed of gift given by her husband making her the absolute proprietor. It is also stated that this very fact is recited in the kubooleut. It is further alleged that the letters of Mr. Donzelle, Junior, as to the payment of rent shews that this lady to whom the kubooleut was given had the real title. Each and every one of these facts, however, is quite consistent with a benamee transaction. In fact, it would be inconsistent if it were not so, as all the

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subordinate parts are in such cases notoriously fitted in to correspond with the benamee arrangement in its integrity. It has been laid down in the case of Gopee Kristo Gossain,* Moore's Indian Appeal Cases, Volume VI, page 53, that the benamee transactions are to be regarded as a recognized system amongst Hindoos; further that they may be *bonâ fide* or not and that the criterion of such *bona fides* may be taken by seeing whence the money came.

Taking this view of the Privy Council in the case cited as a guide, the question which the Lower Appellate Court ought to have tried was whether with all the facts as stated above in favor of the plaintiff, there still might not be only a benamee or fictitious title in his lessor.

It is well known that a benameedar recorded proprietor has to pay the revenue, receive the rent, do every thing in the Collectorate in connection with the revenue affairs of his estate using the benamee name; and such person moreover is the only person who is entitled to draw the excess funds from the Collectorate, being the recorded proprietor though not the real proprietor.

We have been referred to a case in Volume III, Wyman's Reports, but the real question in that case was not as regards the ownership of the land, but as to the trusteeship. There is a case in Weekly Reporter, Volume XIV, page 12. The illustration of the benamee system by Mr. Justice Louis Jackson is exactly in point, *viz.*, that "*A* contracts with *B*, though by the desire and for "the convenience of one or other of those "parties the name of *C* is used instead of "the name of that party. In such a case "*C* did not contract at all. He was not "the agent for either, but was and is a stranger to the whole business."

In that view, it would be impossible to say that really the contract in this case was with Anusul Burkut to whom the kubooleut was given, if in fact her husband is upon the evidence shewn to be the real owner and to have had the real profits transferred to him after they had gone through the necessary *form* of passing through his wife's hands as benameedar.

Whether it was really benamee or not, and whether the real title was with the husband or with Anusul Burkut or with the co-wife, were points which were necessary to be investigated before a proper decision could be come to in this case. It is said that this was only a suit for rent, and that the question of title could not be decided in such a suit; but it has been laid down that although the jurisdiction of the Revenue Courts is limited to the trial of suits for rent, yet they are not precluded from trying questions of title when requisite in order to enable them to come to a decision as to who is entitled to the rent. In one case Sir Barnes Peacock observed that if questions of title cannot be gone into in a suit for rent, any ryot wishing to evade payment of rent has only to collude with the lakherajdar, set up a lakheraj title, and defeat the landlord's just claim for rent.

For the above reasons, I would remand the case for trial on the merits.

Paul, J.—I also think that the case should be remanded to be tried on the merits. This case is very clear and simple. The plaintiff's allegations are that he obtained a putnee from a certain lady named Anusul Burkut, who is one of the widows of Golam Hossein; that this lady was the owner of the whole 16 annas of the property which once belonged to Golam Hossein and which was made over to this lady by gift, and that as such owner Anusul Burkut was entitled to create and she created the said putnee deed in his favor; that the defendant executed a kubooleut or the counterpart of a lease in favor of the lady from whom the plaintiff claims; and that thus plaintiff became entitled to the rents of the lands comprized within the zemindaree. He, therefore, brings this suit for arrears of rent due to him.

The defendant's allegations are that he is the tenant, so to speak, of only 1-16th of the property in suit to the plaintiff, and that he is the tenant of 15-16ths share to the other heirs of Golam Hossein, and that Golam Hossein was the real proprietor of the land and only made use of his wife Anusul Burkut's name in the papers as benameedar for him; that after Golam Hossein's death 1-16th share of his property vested in the widow through whom the plaintiff claims and 15-16ths vested in the other heirs through whom he (defendant) claims.

In short, the point in issue was whether or not the lady Anusul Burkut was the *de-facto* landlord of the defendant. That question was a simple question to try upon the

* 4 W. R., P. C., p. 46.

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evidence; but instead of doing so, the Judge disposed of the substantial case put forward by the defendant by adjudicating in the plaintiff's favor upon the question of estoppel raised by him: and applying the technical doctrine of estoppel obtaining under the English law, the Judge considered that he could not look behind the kubooleut which was admitted by the defendant, inasmuch as a tenant could not deny his landlord's title. My learned collengue has pointed how this mode of treatment amounts to a begging of the whole question. I do not propose to discuss here the doctrine of estoppel, but as this subject is so often used in arguments and in grounds of appeal before the Court, I wish to make a few remarks with reference to it. In England where the usage denoted by benamee transactions is wholly unknown, it is supposed and therefore assumed that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn instruments. They are executed after considerable deliberation and under the guidance and with the advice of able legal advisers. In England, and in fact wherever the English law prevails and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represent the true state of things, and consequently parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statement wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law. The tendency of the Privy Council decisions has been to make the law harmonize with justice in each case, and it would be departing from this wholesome and beneficial rule to apply the doctrine of estoppel to cases which are not governed in this country by English law. As the Courts of this country are constituted, they should so decide cases that the real truths should be arrived at and should be made to prevail by their decrees. The application of a technical doctrine which must, I believe, lead to inevitable fraud and clear injustice, should neither be enforced nor adopted by Courts which are directed to decide cases by the principles of justice, equity and conscience. The question between the parties was very simple, *viz.*, was the lady Anusul Burkut the real proprietor of the whole 16 annas of the property in suit, and I regret to find so simple a question entangled with a technical rule of the English law of evidence. I would observe that although the rules of evidence as they obtain in England are drawn from experience of human affairs by eminent men, it cannot be maintained that that experience is the same every where and should be universally accepted. As to the broad principles of evidence, no doubt they must be every where the same; but the question here is whether an highly technical doctrine ought to have any place in the course of the administration of justice amongst a people whose institutions and usages differ widely from those which exist amongst western nations; and I consider the question admits of one correct answer, namely, that the technical doctrine of one system of laws should not be imported into another and wholly different system.

The case must, therefore, be remanded to be tried on its merits, and in trying it the Court below should minutely examine all the facts of the case and give due weight to each circumstance; for instance, it has been *represented* to us in the course of the argument (I only say "*represented*" for I do not wish to conclude parties by any statement of the facts by me) that the property in dispute was the sole property of which Golam Hossein died possessed. If it were so, it would be a strong circumstance to take into consideration in determining whether the alleged gift by Golam Hossein was ever made in favor of the one wife to the exclusion of the other, for whom also it is not denied that he had strong attachment and by whom he had children.

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The 28th July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Butwarrah under Regulation XIX of 1814—Right of suit—Cause of action.

Case No. 150 of 1871.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30*th November* 1870, *affirming a decision of the Moonsiff of Mozufferpore, dated the* 20*th July* 1870.

Sheo Pershad Sookool (Defendant) *Appellant,*

versus

Shunkur Sahoy (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

A Butwarrah proceeding under Regulation XIX of 1814 may be final for fiscal purposes, but it cannot take away the right of suit conferred by Act VIII of 1859.

A Collector's declaration of the title of a party to an entire share of an estate and his action in dividing the share for such party, are an injury to and a slur upon another party claiming a fraction of the share and give him a sufficient cause of action.

Glover, J.—THE objections raised in this special appeal are :—

(1) That no civil suit can be maintained to set aside a Butwarrah made by the Collector under Regulation XIX of 1814.

(2) That the plaintiff in this case showed no cause of action.

(3) That he had not proved, as he was bound to do, that he was in possession of the disputed property on the date of suit, *viz.*, February 8th, 1870.

The first question has been decided by this Court in the cases of Koonj Beharee Singh *vs.* Neero Singh* and Spencer *vs.* Puhul Chowdhry†; and we see no reason for doubting the correctness of those decisions. A Butwarrah proceeding under Regulation XIX may be final for fiscal purposes, but it cannot take away the privilege which suitors have under Act VIII of 1859. The case of Shaikh Jakir Ali *vs.* Jugdessuree, I Weekly Reporter, 323, which has been quoted in support of the argument is entirely different from the one we are now dealing with. In this case, the plaintiff was no party to the Butwarrah proceedings; in that, he was a party from the commencement and had taken an active part in the arrangements before the Collector.

The second objection is untenable. Special appellant contends that if the plaintiff is not bound by the Butwarrah proceedings, and if he is as he states still in possession of his share, no harm has been done him and he has no cause of action.

But although the Butwarrah proceedings do not conclude the plaintiff, there can be no doubt that the fact of the Collector's having declared the defendant entitled to a divided share of 9 annas odd in the estate, and having then proceeded to divide that share for him, did the plaintiff a substantial injury and cast a slur upon the plaintiff's title which it was very necessary for him to get rid of. His right as a 17 gundahs 2 cowries share-holder was *primâ facie* endangered by the declaration of the Revenue Court that the defendant held the entire 9 annas, and if the plaintiff had wished to sell his interest these proceedings of the Collector would have interfered very materially with his doing so. We think that the plaintiff was quite justified in bringing his suit.

The third objection is, we think, sufficiently disposed of by the finding of the Judge. He has held it proved on the evidence that the plaintiff was in possession

* 15 W. R., p. 291.

† 15 W. R., p. 471.

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of the share when he leased it to the Uttur Indigo Factory in 1866, and that it is only since the Butwarrah that the defendant has collected a 9 annas share of the rents. The factory, it appears, holds leases from both plaintiff and defendant, and the late proceedings have no doubt made it difficult to say in what proportions the factory made its collections. But inability on the part of the factory to collect in the share as leased to it by the plaintiff would not dispossess the plaintiff, and there is, therefore, nothing wrong in law in the Judge's finding that at the date of the Butwarrah the plaintiff was in possession of the disputed share through his ticcadar, the manager of the Uttur Indigo Factory.

The special appeal is therefore dismissed with costs.

The 29th July 1871.

Present :

The Hon'ble A. G. Macpherson, *Judge.*

Clause 30, Letters Patent—Appeals to Privy Council.

In the matter of

The Court of Wards on behalf of the Rajah of Durbhangah (Appellant to England) *Petitioner,*

versus

Rajah Leelanund Singh (Respondent to England) *Opposite Party.*

The Advocate General for Petitioner.

Mr. J. W. B. Money for Opposite Party.

Under Clause 39 of the Letters Patent of 1865, there is no right of appeal to the Privy Council from a decree made by the High Court in the exercise of original jurisdiction, if an appeal will lie to the High Court itself under Clause 15; but there is a right of appeal from a decree made in the exercise of appellate jurisdiction whether an appeal will lie to the High Court under Clause 15 or not.

Macpherson, J.—I THINK that this application ought to be granted.

Clause 39 of the Letters Patent of 1865 ordains, as I read it, that any person may appeal to the Privy Council from any final judgment, decree, &c., of the High Court made in appeal, and from any final judgment, decree, &c., made in the exercise of original jurisdiction by a majority of the full number of Judges of the High Court or of any Division Court from which an appeal does not lie to the High Court under Clause 15,—provided the appeal directly or indirectly involves a question as to property the value of which is not less than rupees 10,000 : and that any person may appeal to the Privy Council from any other judgment, decree, &c., when the High Court shall declare that the case is a fit one for appeal.

The petitioner seeks to appeal from a decree passed by a Division Court consisting of two Judges. As regards the subject-matter of the proposed appeal the Judges were divided in opinion ; and as provided by Clause 36 the opinion of the Senior Judge prevailed. It is admitted that under these circumstances the petitioner had, according to the construction which has been put upon Clause 15 of the Letters Patent by a Full Bench of seven Judges (Weekly Reporter, Volume VII, pp. 52 and 512) a right to appeal to this Court from the decision of the Division Court : and it is contended on behalf of Rajah Leelanund Singh who opposes the present application that the petitioner having an appeal to the High Court under Clause 15 has no right of appeal to the Privy Council.

But a careful consideration of the provisions of Clause 39 will show that this is not so. A strictly grammatical construction of the language used proves that the words—"from which an appeal shall not lie to the said High Court under the provision contained in the 15th Clause of these presents," apply only to the immediately preceding passage "and from any final judgment, decree or order made in the exercise of original jurisdiction by a majority of the full number of Judges of the said High Court or of any Division Court." Taking the words as they stand and putting the natural construction upon them, there is no right of

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appeal to the Privy Council from a decree made in the exercise of original jurisdiction if an appeal will lie to the High Court itself under Clause 15, but there is a right of appeal from a decree made in exercise of appellate jurisdiction whether an appeal will lie to the High Court under Clause 15 or not. If these were not the meaning intended, the words "and from any final judgment, decree or order," would not be repeated, as they are, immediately before the words "made in the exercise of original jurisdiction, &c."

I have no doubt that a distinct line was intended to be drawn between decrees made by this Court on appeal and decrees made by it in the exercise of ordinary jurisdiction. This view is somewhat corroborated, I may add, by the words used in the latter part of Clause 39,—"or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid."

The construction I put upon Clause 39 is that which Sir Barnes Peacock was inclined to put upon it,—as appears from the judgment delivered by him in the Full Bench case to which I have already referred. He says (VII Weekly Reporter, 57) "It "has been said that Section 39 of the "Letters Patent gives an appeal to Her Ma-"jesty in Council from any final judgment, "decree or order of the High Court made on "appeal in any matter not being of criminal "jurisdiction, but with respect to judgments, "decrees or orders made in the exercise of "original jurisdiction an appeal is given to "Her Majesty in Council only when the "judgment is one from which an appeal "shall not lie to the High Court under the "provision contained in the 15th Clause of "the Charter; and it is argued that if it "had been intended that Section 15 should "apply to judgments passed in the exercise "of appellate civil jurisdiction, as well as "to those passed in the exercise of original "civil jurisdiction, the words 'from which "an appeal shall not lie to the said High "Court under the provision contained in "the 15th Clause of these presents' in "Clause 39 of the Charter would have been "made applicable to judgments passed on "appeal as well as to judgments made in "the exercise of original jurisdiction, and "that, reading Section 15 by the light "thrown upon it by Section 39, it must be "held not to be applicable to judgments "made on appeal.

"The argument is plausible, but it is not "conclusive. We cannot say that it was "not the intention of Section 39 of the "Charter to draw a distinction between "judgments passed in appeal and judgments "passed in the exercise of original jurisdic-"tion to the extent of leaving it optional to "parties to judgments given by a Division "Bench to appeal at once to Her Majesty "in Council from a judgment given by a "Division Court in the exercise of appel-"late jurisdiction, even though it might be "one from which an appeal would lie to the "High Court; but in the case of judgments "given in original jurisdiction to allow an "appeal to Her Majesty in Council only in "cases not appealable to the High Court. "It cannot be said that such a distinction "would have no reason in support of it, "when it is borne in mind that every judg-"ment given in appeal must be on a matter "which has been previously before one "other Court at least, and in special appeal "before two other Courts."

Even, however, if the words in the earlier part of Clause 39 did not give a right of appeal to the Privy Council, I think it clear that this is a case in which I have power to declare, and ought to declare, "that the case is a fit one for appeal" to the Privy Council, within the meaning of the latter part of the Clause.

Under Clause 39 there are two classes of appeals. One class comprises those in which the value directly or indirectly involved is not less than rupees 10,000. The other class comprises cases which are declared by the High Court to be fit cases for appeal, though not of such value as to bring them within the first class. The Clause ordains in fact that any person may appeal to the Privy Council from any judgment, &c., "or "from any other final judgment, decree, or "order made either on appeal or otherwise "as aforesaid, when the said High Court "shall declare that the case is a fit one for "appeal" to the Privy Council.

It appears to me that it is most desirable and fit that under the peculiar circumstances of this case the appeal should now lie to the Privy Council, and not to the High Court.

The Division Court decided to a certain extent in favor of the present petitioner; and to that extent the Judges were not divided in opinion. There being no appeal, under Clause 15, from that portion of the

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decree, Rajah Leelanund Singh has appealed to the Privy Council, as he has an undoubted right to do. Having so appealed, he opposes the petitioner's application and wishes to drive him to an appeal under Clause 15 before he can go to the Privy Council. The appeal being to a certain extent before the Privy Council, it is manifestly most inconvenient that it should be to a certain other extent before the High Court,—especially when it is borne in mind that (as was stated by Counsel in the course of the argument on this application) the hearing of the appeal by the Division Court occupied more than one whole month, and that it appears upon the face of the decree that the point of difference between the Judges of the Division Court is the construction to be put upon an order made by the Privy Council itself some years ago, and out of which order the present proceedings have arisen.

Under all the circumstances, I should have no hesitation in declaring the case to be a fit one for appeal, if I deemed such a declaration necessary in order to enable me to grant this application. But I do not consider it necessary to make any such declaration formally, as I have no doubt that, independently of my making it, the petitioner is entitled to appeal to the Privy Council.

The 2nd August 1871.

Present :

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Mahomedan Law—Succession—Office of Sujjada-nusheen.

Case No. 243 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 27th August 1870.

Shah Ahmud Hossain (Plaintiff) *Appellant,*

versus

Shah Mohiooddeen Ahmud (Defendant) *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale for Respondent.

Under the Mahomedan law, offices like that of Sujjada-nusheen should descend to persons in the male line, and those who are descended from females are regarded as not belonging to the family of the founder, but strangers.

Where such an office has been once diverted for sufficient cause (*e. g.*, default of male issue) from a particular line of descent, it is liable to be brought back into the line of a previous holder when the person claiming under that holder is a descendant in the female line.

Jackson, J.—THIS suit was brought by Shah Ahmud Hossain, the son of Shaikh Mohamud Ajmul Hossain, deceased, to recover from the defendant, Shah Mohiooddeen Ahmud, the son of Shah Fukhurooddeen Ahmud, certain immoveable property, buildings, and other property of various descriptions, annexed to the *khankah* of Sasseram in Zillah Shahabad, on the ground that the plaintiff was entitled, and the defendant was not entitled, to hold the office of *Sujjada-nusheen* of that *khankah*, and consequently, as a matter of right, to the possession of all the property specified.

It appears that the property in question was, as to some small portion of it, held under an assignment for certain charitable purposes by the earliest named ancestor of these parties, named Shah Kubeer Durvesh, but, as to most of it, under successive grants from the Emperor or titular Emperor of Delhi, which are set forth in the proceedings. It was alleged that the office of *Sujjada-nusheen* was necessarily to be held by the descendants of Shah Kubeer Durvesh, and, in particular, in consequence of certain restrictions in the later grants, by the lineal descendants of Shah Kyamooddeen and Shah Shumsooddeen, two of the successors of Shah Kubeer Durvesh. I shall refer more particularly to the circumstances presently.

The defendant made answer that the plaintiff was disqualified as being no descendant in the male line of the founder, Shah Kubeer Durvesh; also that he, the defendant, had been regularly appointed to the office of *Sujjada-nusheen* by the late incumbent, Shah Kubeerooddeen Ahmud,

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and that such appointment was valid. He also contended that the suit of the plaintiff was barred in consequence of adverse holding for about half a century by the defendant and his uncle and predecessor Shah Kubeerooddeen, and that it was further inadmissible inasmuch as a previous like claim had been set up by the plaintiff's maternal uncle, Shah Fyazooddeen Ahmud, and had been set aside; and that consequently the plaintiff's suit was barred in every point of view.

The Subordinate Judge who tried the suit threw it out upon two grounds; and he also intimated an opinion that the suit was liable to be dismissed upon a third ground, all of them being preliminary matters. In the first instance, he held that the suit was barred under Section 2 Act VIII of 1859, as being brought on a cause of action which had been heard and determined in the Civil Court in a former suit between the parties under whom the present parties advance their respective rights; secondly, he held that the law of limitation barred the suit on the ground, chiefly, that Fyazooddeen, the uncle, just mentioned, of the plaintiff, might have brought his suit, but did not, to establish the same claim which in fact the plaintiff is now advancing, but that he lived 46 years during which time adverse possession was held by Kubeerooddeen and by the present defendant, without bringing any such suit. On these two grounds, he dismissed the plaintiff's suit; but he also intimated an opinion that inasmuch as the suit was a claim to hold two offices, *viz.*, the office of *Sujjada-nusheen*, and also that of trustee or manager of *wuqf* property, it must be held to be multifarious under Section 7 Act VIII of 1859 and liable to dismissal upon that ground.

In dismissing the suit upon these grounds the Subordinate Judge further remarks that "this decision cannot bar the exercise "of the authority of Government vested "under the Mahomedan law to remove the "present defendant from the office of "trustee on proof of misconduct and to "appoint one more fitted for the post as "required by law."

The first thing we have to do in delivering judgment in this case is to state that we do not concur with the Subordinate Judge in any one of these propositions. It seems to me quite clear that the suit before us was not barred on any of the grounds stated, and also that it would be quite improper, as being unnecessary, for us to affirm that the Government would have the power, under Mahomedan law or any other law, to remove the defendant from the office of *Sujjada-nusheen*. That is a question which, if the occasion should ever arise, would have to be properly enquired into and determined.

Being, therefore, unable to concur with the Subordinate Judge in the grounds on which he has dismissed the suit, we had to consider in the first instance whether we should require further evidence to be taken, and in the next place whether on the case as it stands, we ought to determine in favor of the plaintiff or in favor of the defendant. We have considered that it is unnecessary to order the case to be remitted for further enquiry, but that we can come to a decision on the case as it stands.

The way in which the parties derive from the original founder of this institution is this. The original founder was Shah Kubeer Durvesh, otherwise called Huzrut Shah Kubeer. I am now referring to the genealogical tree as filed by the plaintiff, which is at page 40 of the printed book. The plaintiff states that Shah Kubeer Durvesh had an elder son, Shah Khuleeloollah, who succeeded his father; and that on his death he was succeeded by Shah Golam Shurfooddeen who was married to his daughter. Curiously enough, the pedigree here given entirely omits to state who was the father of Shurfooddeen, although this omission, coupled with the statement that Khuleeloollah was the elder son of Shah Kubeer Durvesh, is tolerably significant, and in point of fact lends considerable support to the allegation of the defendant that Kubeer Durvesh had a second son named Khairoollah, whose son Shurfooddeen was. Be that as it may, Shurfooddeen succeeded; and he, it appears, had two sons, the one named Shah Kyamooddeen and the other Shah Golam Ghous. Kyamooddeen succeeded, and he received a further grant of property from the Emperor Shah Alum about the year 1762, A. D. He was succeeded by his son Shumsooddeen, who received the last grant of the same Emperor in the year 1802, A. D.

Shumsooddeen died without male issue, but leaving a widow called Kadura, *alias* Bebee Asmut, and an infant daughter

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named Lootfoonnissa. It appears to have been the intention of Shumsooddeen that this daughter should be married to his cousin's son Kubeerooddeen; and it is not disputed that Shumsooddeen did, before his death, nominate and set up this Kubeerooddeen and declared him to be *Sujjada-nusheen* in succession to himself.

The widow of Shumsooddeen appears to have quarrelled with Kubeerooddeen. She broke off the marriage between Kubeerooddeen and her daughter, whom she accordingly married to some body else; and she retained for some time the property of the *khankah* and resisted Kubeerooddeen's attempt to recover possession, and he was obliged to enter upon a protracted litigation which went up to the Privy Council, but ultimately he recovered and held the property during the whole period of his life which lasted about half a century. He died in the year 1869, and before his death he appears to have made choice, having no son of his own, of the present defendant, Mohiooddeen, who was one of the sons of his own next brother. He communicated to the Government his wish that Mohiooddeen should succeed, and he left him in possession.

Lootfoonnissa, the daughter of Shumsooddeen, as previously mentioned, was married according to her mother's designs, and she had a son, Shah Fyazooddeen Ahmud, and a daughter named Bibee Kurmun. Fyazooddeen, during his lifetime, made some faint attempts to establish a claim to the office of *Sujjada-nusheen*, but never went so far as to bring a regular civil suit. The present defendant is the son of Bibee Kurmun, his sister, and he claims now to be entitled as the lineal descendant, although in the female line, of Shumsooddeen.

Now there is one point in this pedigree which is of considerable importance, and which, if it had been decided, would have greatly simplified the decision which we have to give. If it were admitted, or proved, that Shurfooddeen, the immediate ancestor of Kubeerooddeen, had been the son of a second son of Shah Kubeer Durvesh, it would then be manifest that the defendant is a descendant in the male line of the original founder, whereas the plaintiff now before us would have been no descendant at all in the male line, but removed by two females from the line of the original founder. The plaintiff has laid, therefore, considerable stress upon the two grants given in the time of Kyamooddeen and Shumsooddeen. It seems to have been supposed that these two grants in some way limited the enjoyment and descent of the property to the descendants of these two persons, Kyamooddeen and Shumsooddeen.

Now it is clear that the plaintiff claims the whole of this property in virtue of his right to the office of *Sujjada-nusheen*; that the property cannot be looked upon in any other point of view, and was not regarded in the plaint in any other point of view, than as being annexed to the office of *Sujjada-nusheen*. He, in fact, alleges himself to be entitled to that office, and it is as claimant to that office that he asks for a decree. I conceive, therefore, that the properties acquired under the later grants were not conferred under any restrictions as to descent so as to confine them to the line of those two grantees, but merely as an increment on the original grant.

Consequently, the circumstance that these grants were made in the time of Kyamooddeen or Shumsooddeen makes no difference whatever as to the line in which this office had to descend. Therefore, if the descent of the defendant in the male line from Shah Kubeer Durvesh was clearly made out, I think there could be no question as to his right to hold this office in preference to the plaintiff; but even if this be not so, it may be said, I think, that in default of the male issue of Khuleeloollah the line of his daughter who married Golam Shurfooddeen was substituted for the line of the original founder; and, if so, we have again the fact that the defendant is a direct male descendant of that line, and that the plaintiff is not so, but is removed by two female descents, both his father and his grand-father having belonged to an entirely different family.

The Mahomedan law appears to require that offices of this kind should descend to persons in the male line, and to regard those who are descended from females as not belonging to the family of the founder, but strangers. The plaintiff has not brought to our notice any rule of Mahomedan law by which, when an office like that of *Sujjada-nusheen* has been once diverted, for what must be held to be sufficient cause from a particular line of descent, it is liable to be again wrested from that line and brought back into the line of a previous holder, when the person claiming under that previous holder is a descendant in the female line.

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There seems to be, therefore, no rule of Mahomedan law,—at any rate, none such has been made out,—upon which we ought to give this property to the plaintiff; and it seems to me that any such decision which would have the effect of divesting the defendant, who is confessedly a descendant in the male line from, at least, some of the holders of this office, in order to confer it upon a person who is not a descendant, even primarily, in the female line, but is removed by two steps from the line of the founder, would be entirely contrary to the spirit of Mahomedan law; and any such claim is still less to be regarded with favor when the office and property have been held for a period of more than half a century in the line in which they now are.

I think, therefore, that the plaintiff has made out really no case. Even without its being ascertained who the father of Golzm Shurfooddeen was, the case is so clear in favor of the defendant that we are not called upon to go further, but ought to dismiss this suit. Accordingly, both the plaintiff's suit and this appeal are dismissed with costs.

Macpherson, J.—I concur.

The 3rd August 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Documents — Certified copies — Evidence—Section 170, Civil Procedure Code.

Case No. 487 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 7th February 1871, *reversing a decision of the Moonsiff of Kotulpore, dated the 7th December* 1870.

Tara Chand Banerjee (Plaintiff) *Appellant,*

versus

Boistub Churn Bhadro and others (Defendants) *Respondents.*

Mr. W. A. Montriou for Appellant.

The Advocate General for Respondents.

In a suit by the putneedar for rent due under a dur-putnee, defendant was summoned to produce the dur-putnee pottah and a bynamah which he had produced on a former occasion in a different suit. On his representing that they were lost, plaintiff put in a certified copy of the bynamah, obtained from the office of the Registrar of Deeds.

HELD that as the defendant failed to produce the bynamah or to prove that it was out of his power to do so, the Judge might have passed judgment against him at once under Section 170 Act VIII of 1859. As the defendant gave no clear evidence to rebut the bynamah put in by the plaintiff, the copy of the bynamah was good evidence in support of the plaintiff's case.

Jackson, J.—THE only question in this case is whether the plaintiff made out the allegation with which he started, namely, that the rent due on account of the dur-putnee from the defendants was 641 rupees, and not 341 rupees, as alleged by the defendants.

The plaintiff, it appears, purchased the superior tenure, the putnee, from the Official Assignee, and did not receive after his purchase the usual documents of title. He had to establish his right as putneedar after protracted litigation against the defendants, and now sues to recover the rent of the dur-putnee.

He applied to the Court to summon the defendants to produce the dur-putnee pottah and bynamah which the defendant had produced on a former occasion in a different suit. The defendants gave no proof of the loss of those documents, but put in a petition stating that the documents had been lost by the occurrence of a dacoity in their premises. Thereupon, the plaintiff put in a certified copy of the bynamah which was obtained from the office of the Registrar of Deeds.

Upon that copy, which the Moonsiff considered not to be rebutted or displaced by any evidence on the part of the defendant, a decree was given for the plaintiff for rent at the rate of 641 rupees.

This decision coming in appeal before the Judge, he starts with setting out the facts in a manner which would lead one to suppose that he was about to give judgment in favor of the plaintiff, but then he concludes with these words. "I do not think that "plaintiff's suit can be decreed upon the "mere recital in another document, when "it appears that he might have obtained

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"proof of the amount of rent by summoning "the former putneedar or his Gomastah as "a witness and calling upon them to pro- "duce collection papers, &c. There is no "doubt that plaintiff has not fully proved "his case, and it is a dangerous doctrine to "lay down that if defendants do not produce "their documents, which, be it remembered, "may possibly have been lost, the plaintiff's "claim is to be decreed without proof. "Plaintiff has neglected to avail himself of "proof which apparently was obtainable."

We are somewhat embarrassed in dealing with this decision of the Judge, because on reading the judgment cursorily it may be said that in one point of view the decision deals with question of fact the Judge having considered the mode in which the plaintiff might have proved his case, and having held that the case was not proved in the best way, and showed that he was not satisfied of the truth of the plaintiff's allegations;—but I think on reading it attentively one cannot fail to see an error in principle, and more than one. The Judge says "I do not think that plaintiff's suit can be decreed upon a mere recital in another document" when he might have proved it in another way. Now it is not shown to us that he might have obtained proof in any other way. It does not appear that there was a putneedar or Gomastah who might have been summoned as a witness or called upon to produce collection papers. The Judge again says that the plaintiff's suit cannot be decreed inasmuch as he has not produced the best evidence that was obtainable. But there is no doubt that it could have been decreed on such evidence as the plaintiff did produce. The plaintiff, having called upon the defendant, who presumably had in his possession the bynamah, from which the rental might have been unquestionably ascertained, to produce it, it was the business of the defendant to have produced that document or to have proved that it was out of his power to produce it; but he did neither. In that state of things, the Court might have given judgment at once against the defendants under Section 170 Act VIII of 1859. But the Court not having done that, I think it cannot be doubted that the plaintiff did give what was good and sufficient evidence of the contents of the bynamah by producing the authenticated copy from the Registry office. The parties do not seem to have questioned the sufficiency and accuracy of that copy: it was probably put in without objection on either side, and must be taken to have been admitted as good evidence of what the bynamah contained.

Then the value of this document to the plaintiff consists in this, that on a former occasion it was put in by the defendants themselves in a suit relating to this very property. They appear to have accepted this bynamah with the admission, if erroneous, made in it, and never attempted to have it corrected. I think it was evidence on which the Judge might have gone. It was not displaced by the defendant, and it had been dealt with by the Court below as satisfactory. In that state of things, the defendant having failed to comply with the order of the Court and having given no clear evidence to rebut that put in by the plaintiff, I think the plaintiff was entitled to the judgment of the Court, and that the Judge was in error in reversing the judgment of the Moonsiff, and that we ought accordingly to set aside the judgment in appeal and restore that of the Moonsiff. The respondent must pay the costs of this and of the Lower Appellate Court.

Macpherson, J.—I concur. I think that the copy of the bynamah was under the circumstances good evidence in support of the plaintiff's case, and that it was sufficient evidence so long as it was not rebutted.

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The 4th August 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Religious festivals—Jurisdiction.

Application for the admission of a Special Appeal from the decision of the Judge of East Burdwan, dated the 1*st March* 1871, *reversing a decision of the Moonsiff of Aosgaon, dated the* 31*st October* 1870.

In the matter of

Gossain Doss Ghose and others (Plaintiffs) *Petitioners,*

versus

Gooroo Doss Chuckerbutty and others (Defendants) *Opposite Party.*

Baboo Bungshee Dhur Sein for Petitioners.

No one for Opposite Party.

A suit for a declaration of a right to receive marks of recognition and honor at idol-festivals, or for damages from priests for withholding the same, is not cognizable by a Civil Court.

Kemp, J.—We think that this application for the admission of special appeal must be rejected. The only point taken in special appeal is that the Lower Appellate Court was wrong in law in holding that the suit would not lie. The plaintiffs brought their suit for a declaration of their right to receive, at the hands of the Poorohit of the village-idol at certain festivals, *malla* and *telok* and other marks of recognition and honor, and to obtain damages from the priests for withholding these marks of respect on three occasions in 1276. The Moonsiff decreed the case, directing the Poorohit defendants to give necklace and *telok*, &c., to the plaintiffs at certain festivals or to pay them fifty rupees as compensation for loss of honor. The Judge observes, and we think rightly, that a decree of this description is incapable of execution. He finds that the custom pleaded by the plaintiffs has not been proved; that it is entirely in the discretion of the Poorohits to give or to withhold these marks of respect; and that the Court cannot compel the priests to comply with the plaintiff's demand and to perform involuntarily what is essentially a voluntary act. The Judge, accordingly, reverses the decision of the first Court and dismisses the plaintiff's suit; and in support of his view he quotes a decision reported in the Sudder Decisions of 1850, page 64.

We think that the Judge is right. He has found as a fact that there is no such custom as pleaded by the plaintiffs; and that they have not been injured in caste, nor have their privileges and rights been in any way invaded. We, therefore, concur with him in holding that the suit is one which is not cognizable by the Civil Court. The application is rejected.

The 10th August 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Limitation—Prescription—Election.

Case No. 516 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Hooghly, dated the 28*th January* 1871, *reversing a decision of the Moonsiff of Salikha, dated the* 11*th November* 1870.

Rajah Bijoy Keshub Roy (Defendant) *Appellant,*

versus

Obhoy Churn Ghose (Plaintiff) *Respondent.*

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Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Appellant.

Baboos Unnoda Pershad Banerjee and *Bhowanee Churn Dutt* for Respondent.

Per Macpherson, J.—The length of time required in a case of prescription prior to 1st July 1871 was at least 12 years.

The "Limitation Act, 1871," requires peaceable and open enjoyment without interruption for 20 years.

The right asserted in a claim founded on prescription should be strictly and clearly defined, and cannot be based on rights which are inconsistent. When a party is called upon by the Court to elect which branch of a double case he will proceed with, the election must be distinct and clear, and such as will bind him and will show accurately on the face of the record the claim (if any) which is abandoned.

Macpherson, J.—In my opinion, the decree of the Subordinate Judge is wrong.

The Subordinate Judge states in his judgment that the suit is brought to establish a right by prescription to hold what he calls a "floating hât," a hât held partly on land and partly on water, near the mouth of a certain *khal* which runs into the Hooghly. And he finds it proved that the plaintiff has held such a hât "for a good many years," and has levied tolls from the boatmen and others frequenting it, "under a privilege which in the legal sense of it amounts to prescription."

But a finding of this sort, that a man has done certain acts, or made use of his neighbour's property in a certain way "for a good many years," is quite insufficient as a basis of a declaration that the man has acquired by prescription a right to do those acts or to make that use of his neighbour's property. There must be a distinct finding that it is proved that the person claiming the right by prescription has, for a certain length of time, uninterruptedly exercised either himself or by those through whom he claims the right which he sets up. The length of time requisite under the law in force when this suit was instituted was, in my opinion, at the least 12 years. And according to the new "Limitation Act, 1871," which, as regards this class of questions, came into operation on the 1st of July last, peaceable and open enjoyment by the person claiming the right, without interruption and for twenty years, must be proved (See Act IX of 1871, Section 27).

Moreover, the right asserted must be strictly and clearly defined: whereas in the present case the right asserted by plaintiff and established by the decree of the Subordinate Judge is described in the vaguest and most ill-defined manner.

But the whole suit has been wrongly and improperly brought. The Moonsiff was properly justified in the remarks which he made on the mode in which the plaint is framed, and I think he would have done well to have refused to receive it on his file at all.

The plaintiff chose to come into Court with a case which was in itself double and inconsistent, alleging, *firstly*, his proprietary right in the bank of the khal on and opposite to which the hât is held; and *secondly*, his right by prescription to hold the hât there. The defendant claims the site where the hât is held as his property, and denies that the plaintiff has any right by prescription or otherwise to hold the hât there. Thereupon, the plaintiff, not in truth expressly relinquishing or abandoning his claims as proprietor, was allowed in the lower Courts to omit (as it were) going into that part of his case, and to go to trial on a naked ill-defined issue as to whether he has been in the habit for many years of holding this hât at this place.

If the plaintiff had put upon record a formal and complete abandonment of all claim as proprietor to the site on which the hât is alleged to be held, and if he had accurately defined and had detailed the limits of the right which he sought by prescription to establish over another man's property, he might properly have been allowed to go to trial on the question as to prescription. But he ought not to have been allowed to proceed at all so long as every thing was left undefined and uncertain, and so long as there was nothing more than a *quasi* relinquishment of the claim of proprietary right.

It is quite clear to me from the proceedings in the lower Court, and from the manner in which the case was conducted for the respondent before us, that at this moment the plaintiff asserts, and has no intention of ceasing to assert, *title* as proprietor to the site of this hât. If he is really proprietor, he may be entitled to a decree as such, but he certainly cannot be entitled to a decree declaring a right by prescription. The two rights are wholly inconsistent.

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Parties are not entitled to come into Court and ask for assistance until they have made up their minds in some degree as to what their position is and as to the assistance for which they have a right to ask. And if a plaintiff coming into Court with a vague double case is called upon by the Court to elect which branch of his case he will proceed with, the election must be distinct and clear and such as will bind the party electing and will show accurately on the face of the record the claim (if any) which is abandoned.

On the whole, I have no doubt that the decree of the Lower Appellate Court should be set aside, and that the plaintiff's suit ought to be dismissed with costs in all the Courts.

Jackson, J.—I entirely concur in the decision following the judgment just delivered by my learned brother Macpherson, but I am precluded from adopting that judgment entirely in consequence of the expressions which it contains in respect of the right of prescription as maintainable in the Courts in this country. I desire not to commit myself to any expression to the effect that a particular period of 12 years has been heretofore necessary in such cases, and I am very glad to think that the point has now been settled by the Legislature. At the same time, I think it right to say that an opinion of mine, which, I believe, is referred to in the judgment of the Court below in this case, and cited as a ruling of the High Court dated 13th March 1869, and which is to be found in XI Weekly Reporter, page 236, has been very often quoted and a good deal misapprehended. In disposing of that case, I had the advantage of the assistance of my learned brother Markby, than whom I am sure there is no more cautious and careful Judge in this or any other Court, and who concurred entirely in the decision of that case; and I think that if the words which are used are taken as they stand, they are capable of being fully supported. But I have never held, and do not now affirm, that a person could succeed in a suit to establish a right of prescription merely by giving evidence of the use of a certain right for 5 or 6 years.

It is not necessary to say more in the present case than that the case of the plaintiff is contradictory; that he set up but did not clearly and finally adopt and rely upon one or other of two wholly different and contradictory causes of action. The proposed order, therefore, reversing the judgment of the Court below, is one in which I entirely concur. The judgment of the Lower Appellate Court will be reversed and the plaintiff's suit dismissed with costs.

The 11th August 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Butwarra—Possession—Onus probandi.

Case No. 544 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 16th January 1871, affirming a decision of the Moonsiff of that District, dated the 5th August 1870.

Syud Mobaruk Ali (Defendant) *Appellant,*

versus

Syud Imdad Ali (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Baboo Boodh Sein Singh for Respondent.

In a suit for possession, with mesne profits, on the ground that the lands claimed were allotted to plaintiff's share by a butwarra under Regulation XIX of 1814, where defendant, admitting the allegation, urged that plaintiff had given up possession as soon as the butwarra was completed:

HELD that it was for plaintiff to prove that defendant had interfered with the possession awarded to him by the Collector.

Mitter, J.—THIS is a suit for the possession of certain lands with mesne profits. The plaintiff alleges that the lands in question were allotted to his share by a butwarra made by the Collector under the provisions of Regulation XIX of 1814, but that the defendant who was a share-holder in the original estate refused to give up possession notwithstanding the butwarra.

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The defendant in his written statement admits that the disputed lands have been allotted to the plaintiff's share by the Collector, but he alleges that he had given up possession of those lands as soon as the butwarra was completed, and that ever since that date he had nothing whatever to do with them.

Upon this state of the pleadings both the lower Courts have given a decree to the plaintiff for possession with mesne profits, and the question raised for our decision in special appeal is whether the lower Courts have acted rightly in law in throwing the entire burden of proof on the defendant.

We are of opinion that this question ought to be answered in the negative. Section 20 of Regulation XIX of 1814 provides that "the determination of the "Board of Revenue or Board of Commis-"sioners on the paper of partition shall be "final, and the Collector on receiving noti-"fication thereof shall put the parties in "possession of their respective estate, and "immediately make the necessary entries "in the records of his office." It is to be legally presumed that the Collector who made the butwarra observed the provisions of this Section and that he awarded possession of the estate allotted to the plaintiff according to those provisions. The plaintiff is seeking in this case to make out that the defendant is a wrong-doer, and it is for the plaintiff, therefore, to prove that the defendant has interfered with the possession awarded to him by the Collector, and has thereby made himself liable for mesne profits. It is not enough for the plaintiff to shew that certain lands were allotted to him by the butwarra. He must shew either that the defendant refused to give up possession of those lands or that he is still enjoying them notwithstanding the delivery of possession by the Collector.

In this view, we are obliged to remand the case to the Lower Appellate Court for a fresh decision. The plaintiff will be required to prove his cause of action, and as there appears to have been some irregularity in the examination of witnesses in the first Court, we direct the Lower Appellate Court to give full opportunity to the parties to produce any evidence they might think necessary before the case is finally disposed of. The case is to be taken up at once out of its turn.

The costs of this appeal will abide the result.

The 11th August 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abatement of rent—Land taken for public purposes—Compensation.

Case No. 450 of 1871.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st December 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th July 1870.

Maharajah Dheraj Mahtab Chand Bahadoor (Plaintiff) *Appellant,*

versus

Chittro Coomaree Bibee and others (Defendants) *Respondents.*

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboos Hem Chunder Banerjee and *Bhowanee Churn Dutt* for Respondents.

A claim for rent being a recurring cause of action, a tenant is entitled to set up against it for any particular year, any right which he had to a deduction or abatement notwithstanding that he has paid full rent for several previous years.

When land is taken away for Railway purposes and compensation made, which is divided between the zemindar and those holding under him, any deduction of rent claimed from the zemindar must be reckoned with reference, not to the gross amount of compensation, but to the proportion which passed into his hands.

Kemp, J.—THIS was a suit for the recovery of rent for the year 1276. The defendant raised certain objections, namely, 1*st*, that 33 beegahs 18 cottahs and a fraction had been taken for Railway purposes, and therefore that he is entitled to an abatement on the jummah to the extent of 56 rupees 4 annas; that as the plaintiff, the Rajah, had got a share in the amount of compensation received from the Railway Company, therefore the said 56 rupees 4 annas ought to be deducted from the claim.

The first Court held that as the lands have been taken for Railway purposes, there could be no doubt that every body must admit that the right to receive rent is inherent in the land, and if there is no land the right to receive rent can no longer exist; that in this suit, the plaintiff cannot deny that the quantity of land alleged by the defendant has

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been taken away for Railway purposes; that the plaintiff did not say that he had not received the full value of his lands, and therefore it must be held that his right to receive rent has become extinct with reference to the 33 beegahs 18 cottahs.

The Judge, in a very short decision, says that two grounds of objection to the order of the lower Court were urged in appeal; 1*st*, that a remission cannot be granted in a suit for arrears of rent; and 2*nd*, that the remission granted is out of proportion to the mokurruree jummah.

With regard to the first objection, the Judge held that a deduction may be made in a suit for arrears of rent in consequence of a diminution in the area of the land by diluvion or otherwise, and that the defendant was justified in urging his plea and asking for a deduction on account of the land taken from his tenure for the Railway under the orders of Government.

With regard to the second objection, the Judge, without giving any reasons for his decision, found that the defendant is fairly entitled to the deduction he claimed, namely, rupees 56-4. He seems to think that because that land was valued in the presence of the parties interested, that a more fair way of ascertaining its value could not be arrived at.

Now, in appeal, the points taken are; 1st, that the defendant cannot claim this abatement inasmuch as he has paid the full rent for several years prior to suit; and 2nd, that the total amount of 56 rupees 4 annas ought not to have been deducted.

The first ground, we think, is wholly untenable. There is no doubt that this is a suit for rent for the year 1276, and as contended by Baboo Hem Chunder Banerjee, a suit for rent being a recurring cause of action the defendant was entitled to set up against the claim for any particular year any right which he had to a deduction from the amount claimed or to abatement. The first ground is, therefore, overruled.

On the second ground, the pleader for the respondent admits that his client is not entitled to the whole 56 rupees 4 annas, and we think that in making this admission he has acted fairly and properly in this matter. There can be no doubt that his client cannot be entitled to the whole of that amount. The land taken by the Railway is 33 beegahs 18 cottahs, but there are several intermediate holders between the Rajah and the ryot, namely, the mokurrureedar, the dur-mokurrureedar, and the ryot; and the rupees 54-4 represents the gross rent payable to the dur-mokurrureedar and not the rent payable by the defendant, the mokurrureedar, to the Rajah. When this land was taken for Railway purposes, the Government officers ascertained the full value of the land in this way, namely, the gross rental was taken to be 56 rupees 4 annas, and it was considered that twenty times that amount was a fair compensation to be made for the value of the land; and a compensation of rupees 1,125 was accordingly awarded. Out of this the Rajah, the plaintiff, took rupees 769, the mokurrureedar rupees 112, and the dur-mokurrureedar rupees 243; and therefore the sum of rupees 769 which the Rajah received represents the full value to him of the lands taken away for Railway purposes, and therefore the mokurrureedar is entitled to an abatement in proportion to rupees 769. Baboo Hem Chunder Banerjee says that on working out the sum on this basis what he is entitled to would be a deduction of rupees 38-4; but be that as it may, we think that the principle upon which Baboo Hem Chunder Banerjee contends that this deduction is to be made is a correct principle, and therefore we hold that the defendant is entitled to a deduction on his jummah in proportion to the sum of rupees 769 received by the Rajah.

The decision of the Judge must be modified, and each party will pay their own costs of this Court.

The 11th August 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Settled estates in Assam—Lakherajdar.

Case No. 497 of 1871.

Special Appeal from a decision passed by the Assistant Commissioner of Burpetta in Kamroop, dated the 31*st January* 1871, *reversing a decision of the Moonsiff of that District, dated the* 29*th June* 1870.

Jullow Surma Patwaree (Plaintiff) *Appellant*,

versus

Madhub Ram Atoi Boorha Bhukut (Defendant) *Respondent.*

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Baboo Motee Lall Mookerjee for Appellant.

No one for Respondent.

Whatever might have been his position under former Governments, a lakherajdar in Assam is entitled to manage his lands in any manner he pleases consistently with existing Regulations, and, as holder of a resumed grant which has been settled with him, to eject a tenant who has no right of occupancy or lease of any kind.

Mitter, J.—We think the judgment of the Lower Appellate Court in this case ought to be reversed. It is not at all necessary for us to follow the lower Courts into a discussion as to the precise nature of the peculiar rights enjoyed by lakherajdars in Assam. It is sufficient to observe that the defendant is not one of the old Paiks referred to by the Assistant Commissioner in his judgment, and that he has not been able to make out any right of occupancy under the laws in force.

The issue as to the custom prevailing in that country has not also been properly decided by the Assistant Commissioner. He admits that the evidence taken in regard to this issue is in favor of the contention raised by the special appellant, but he goes on to draw inferences from certain books referred to in his decision relating to the state of things in existence under the Assam Rajahs. We do not, however, find that he has been able to make out the position contended for by him, *viz.*, that the holder of a resumed lakheraj grant which has been settled with him by the Government at half jumma is not entitled to eject a tenant whose occupation does not extend over a period (as is shewn in this case) of more than five years, and who has no lease of any kind to support his title. Whatever might have been the position of the lakherajdar under the ancient Governments of the country, it is quite clear that he is now entitled to manage his lands in any manner he pleases consistently with the existing Regulations.

Act X of 1859 has been extended to Assam, and there is nothing in the provisions of that Act or of any other Regulation by which the judgment of the Lower Appellate Court can be supported.

We reverse the decision of the Assistant Commissioner and restore that of the Court of first instance. The plaintiff will get a decree with all the costs of this litigation.

The 14th August 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

Bank of Bengal—Loans—Debts—Security of landed property—Sale of deposited title-deeds.

Case No. 87 of 1871.

Regular Appeal from a decision passed by the Recorder of Rangoon, dated the 4th January 1871.

Ebrahim Azeem (Defendant) *Appellant,*

versus

William Dickson Cruickshank, Agent of the Bank of Bengal at Rangoon (Plaintiff) *Respondent.*

Mr. T. D. Ingram and *Toolsee Doss Seal* for Appellant.

The Advocate General and *Mr. H. C. Marindin* for Respondent.

The provision of law (Section 30 Act IV of 1862) which forbids the Bank of Bengal making a loan or advance on the security of immoveable property, is not intended merely to regulate its affairs as amongst Shareholders and Directors: it is not *ultra vires* for the Bank to take the security of immoveable property as a protection against loss for a debt already incurred and due.

A written authority given to the Bank by a debtor to sell his immoveable property of which the title-deeds are in deposit with it, and to apply the proceeds towards payment of his liabilities, creates an equitable lien upon that property, even if the circumstances under which the deposit was originally made rendered the transactions *ultra vires* of the Bank.

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The following order was passed by the Court on the 2nd August 1871 :—

Macpherson, J.—By the 4th Section of Act IV of 1862, for regulating the Bank of Bengal, the Bank is competent to acquire and hold any description of property whatever, and to transfer and convey the same. Sections 27, 28, and 29 describe what the general nature of the Bank's business is to be, Section 27 giving the Bank power to sell property and securities deposited in the Bank as security for loans and not redeemed, or property or securities recovered by the Bank in satisfaction of debts and claims. Section 30 enacts that the Bank shall not make any loan or advance on mortgage or in any other "manner on the security of any "land, houses, or immoveable property or "the title-deed relating thereto."

The object of the present suit, in which the Bank of Bengal was the plaintiff, is to enforce an equitable mortgage, which is in the plaint stated to have been given to the Bank on the 7th of June 1869 to secure a debt. The main question to be decided is whether the Bank of Bengal, not having power to make any loan or advance on mortgage or on the security of any immoveable property or the title-deed relating thereto, has the power to take security of this nature for any debt actually already accrued due.

The equitable mortgage relied on was given by one Moolla Ahmed. On the 14th of March 1870, the appellant (defendant in the Court below) purchased the right title and interest of Moolla Ahmed in the property, the subject of the mortgage, at a sale in execution of a decree against Moolla Ahmed, the property having been attached under that decree on the 5th of February 1870.

The appellant purchased with notice of the mortgage or lien claimed by the Bank; but he claims to hold the property free from any such lien, on the ground that the Bank acted *ultra vires* in taking such security, and that it is therefore worthless as against him.

It was argued for the Bank that whether the taking such security was *ultra vires* or not, the appellant cannot set up that defence, the provisions of the Act being intended merely for the regulation of the affairs of the Bank as amongst the Shareholders, or as between them and the Directors. But this is not so; and the contrary was decided by the Privy Council in *the National Bank of Australasia* versus *Cherry* (III L. R., P. C., 299), a case which in very many respects resembles the case now before us: We have no doubt that if the taking of this security was *ultra vires* as being forbidden by Section 30, the appellant has a good defence and is entitled to our judgment.

But if the security was given to secure a debt already incurred and due, we do not think that the taking it was *ultra vires*. It is one thing to say that the Bank shall not make a business of lending money on mortgage of land and the like, and another thing to say that money being actually due and owing to the Bank, the Bank shall not take the security of land or other immoveable property, or any other kind of good security not expressly prohibited, with a view to its own protection. The original lending of money on the security of immoveable property is quite a different thing (and affects the general position and business of a Bank quite differently) from taking such security for a debt due. The forbidding the entering into loan transactions on the strength of such security, does not appear to us necessarily to include a prohibition against taking such security as a protection against loss in respect of a debt due: and, in the absence of any express prohibition, we do not see why we should infer an intention to impose it, when very possibly, not to say probably, it was never intended that it should be either expressed or implied. *Primâ facie*, a debt having been actually incurred, it appears to us to be clear gain to the creditor to get any security for it, whether by way of mortgage or otherwise; and we think that the taking of such security *bonâ fide*, is within the general scope of the business of the Bank of Bengal, as it is not expressly declared not to be so.

We proceed to consider whether what occurred on the 7th of June 1869 constituted a giving *on that date* by Moolla Ahmed to the Bank, of an equitable mortgage or lien on this property, by way of security for a debt then due from him to the Bank, for that is the case stated in the plaint and relied on before us by the Advocate General who appeared for the respondents.

The circumstances are somewhat peculiar: and the evidence as to the details of what

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occurred is remarkably meagre. There is no doubt that on the 7th of June 1869, the title-deeds in question were in deposit in the Bank, and had been so for some considerable time. But we have no precise information as to how, or when, or why they came to be in deposit there. Mr. Cruickshank, the manager of the branch of the Bank of Bengal in Rangoon, says that he took charge of his office on the 1st of April 1869, and that the title-deeds were then in deposit: he cannot say when they were so deposited, but they had been in the Bank more than a year: they had been deposited to secure certain bills on which Moolla Ahmed was liable. "The deeds were deposited after the bills "had been discounted; but I cannot say "whether the bills were due at this time. "There was perhaps a sum of rupees 40,000 "due by Moolla Ahmed to the Bank at the "time. The whole was not covered by the "bills." Mr. Pascal, the Assistant Accountant of the Bank, deposes that on the 31st August 1868 Moolla Ahmed owed the Bank rupees 47,300; on the 30th September 1868, he owed rupees 46,300; and on the 7th of June 1869, rupees 41,000, the whole amount on each occasion being the balance of overdue bills.

In this state of things, the title-deeds being as a matter of fact in deposit in the Bank, and Moolla Ahmed being indebted to the Bank in the sum of rupees 41,100, Moolla Ahmed came to the Bank on the 7th of June 1869, was pressed for payment by Mr. Cruickshank, and declared himself unable to pay. We are not told what further passed between the parties, save that Mr. Cruickshank wrote a letter addressed to himself which Moolla Ahmed signed and delivered to him there and then.

The letter is as follows:—

"Rangoon, 7th June 1869.

"To the Agent,

"Bank of Bengal, Rangoon.

"Sir,

"I have to request that you will be good "enough to sell the under-mentioned pro-"perties (the title-deeds of which are in "your hands) either by public auction or "private bargain, and apply the proceeds in "part payment of my liabilities to the Bank, "*viz.*" [Here the details are given.] "And "I hereby bind myself to sign all documents "necessary to convey the properties to the "purchasers when called upon to do so. It "is understood that your right to sue me for "the amount of my liabilities to the Bank, "and recover the same from any other pro-"perty belonging to me or to arrest my "person, shall not be prejudiced in any way "by your complying with the above re-"quest."

The title-deeds were not produced or re-deposited upon this occasion: but they are the title-deeds of the properties specified in the letter. The Bank contends that whatever may have been the previous dealings between them and Moolla Ahmed, an equitable mortgage or lien upon these properties for a debt then due was created by this transaction of the 7th of June. For the appellant it is said that no new equitable mortgage or charge was thus created, but that a mere authority to sell was given with reference to properties the title-deeds of which had been deposited under some previous and improved contract.

We think that the Bank is right in its contention, and that whatever the circumstances may have been under which the title-deeds were originally placed in the hands of the Bank, an equitable mortgage or lien upon these properties to secure payment of the debt then actually due was created on the 7th June 1870. And we think this is so, even supposing it to be the case (which it is not shewn to be) that the deposit was originally made under circumstances which made this transaction one which was *ultra vires* of the Bank. For the decision of the Privy Council in the case of *the National Bank of Australia* versus *Cherry*, already referred to, shows that the debt as security for which the deposit was made, would remain and be enforceable against the debtor though the security might be worthless even as against the debtor as being security which it was *ultra vires* of the Bank to take; and that decision further shows that in such a case the debtor might subsequently, and in a manner so as not to be *ultra vires* of the Bank (it having general power to take such securities for a debt actually due) make a fresh and valid agreement with the Bank authorizing the Bank to retain the deeds and promising that they should remain as a security for his debt.

It appears to us that under whatever circumstances the deeds were in the first instance deposited, a large debt was due from Moolla Ahmed on the 7th June 1869, and that he did then, being pressed for payment, make a fresh arrangement by which he gave an equitable mortgage, or lien, upon these

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properties as a security for debt incurred previously; and that that fresh arrangement was binding upon him, and is binding as against the appellant who purchased with notice of the claim of the Bank and can stand in no better position than Moolla Ahmed himself. Something was said as to its being only a case of a general Banker's lien. But it is not a case of general Banker's lien at all. It is a specific appropriation of certain properties, the title-deeds of which are in the hands of the Banker as security for a specific debt which has been incurred, and is due and payable.

It was also contended that the letter of the 7th June was inadmissible in evidence, because not stamped. But it has been repeatedly ruled in this Court (III B. L. R., 126 and 235, Ap. Civ., and V B. L. R., 10 Appendix)* that the want of a proper stamp is not a ground for reversing the decision of the lower Court when the receiving the document without a stamp does not affect the merits of the case or jurisdiction of the Court. To the like effect is the decision of N. W. Provinces High Court (I Agra, 63). The Madras High Court, we admit, has ruled differently (III Madras, page 297), but we are bound to follow the rule adopted here. It is, therefore, unnecessary for us to express any opinion as to whether the document in question required any, and if any, what stamp.

Mr. Ingram for the appellant mentioned, but did not much rely upon the fact that on the 7th June 1869, the property was under attachment. But as that attachment was removed in September 1869, it left the plaintiff's security untouched (see the decision of the Full Bench in Anund Lall Doss's case,† II B. L. R., page 49, F. B.) The attachment under which the appellant claims was not made till the 5th of February 1870.

We think the judgment of the Recorder ought to be affirmed with costs.

We may remark that it seems to us that (as was suggested by the Advocate General) a decree for sale would have been the better decree to make under the circumstances.

Order passed on the 14th August 1871.

Macpherson, J.—The Advocate General moves, on notice to the appellant, that the decree which we have made and signed in this appeal should be amended, and that the decree of the lower Court should be varied by ordering a sale instead of a foreclosure of the property mentioned in the plaint.

No cause is shown against the application, and I think that it ought to be granted, because, but for the misapprehension on my part, we should have originally drawn up our decree as Mr. Graham now asks that it may be drawn up.

As I have said in my judgment, it appears to me that a sale was the most natural relief to have granted. In the course of the hearing of the appeal, the Advocate General stated that he had a ground of cross-appeal which he desired to raise under Section 348 of Act VIII of 1859, adding that the plaintiff had originally sought a sale and not a foreclosure. If I had understood (as it appears that Mr. Justice Ainslie did) that Mr. Graham intended formally to ask us, and did in fact ask us, to decree a sale, I should certainly have so ordered it. As I now find that I misunderstood him, it was by a mistake on my part that the decree below was simply affirmed. Therefore I think the decree should be now varied, and that a sale after three months should be decreed in lieu of foreclosure. It will be altered accordingly.

Ainslie, J.—I concur in varying the decree as proposed.

The 15th August 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Section 16 Act VIII (B. C.) 1865—Khod-khast ryots.

Case No. 222 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd February 1871, *affirming a decision of the Subordinate Judge of that District, dated the 8th November* 1870.

Koontee Debee (Plaintiff) *Appellant,*

versus

Hirdoy Nath Durreepa (Defendant) *Respondent.*

* 11 W. R., 520; and 12 W. R., p. 46.

† 11 W. R., Original Side Appeals, p. 1.

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Baboo Bama Churn Banerjee for Appellant.

Baboo Umbika Churn Bose for Respondent.

The object of Section 16 Act VIII (B. C.) 1865 is to protect, not merely any one class of tenants, but the lease-holder of the particular land leased; the expression "khod-khast ryots" as used there, meaning "resident and hereditary cultivators."

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiff sued for declaration of title and possession of certain lands by virtue of a mokururee pottah obtained by him from the dur-putneedar Seeta Ram Banerjee, dated the 6th Kartick 1275, B. S. The plaintiff alleged that a suit was instituted against the dur-putneedar for arrears of rent; that a decree was obtained against him a month or two afterwards, in execution of which the tenure was sold and purchased by the defendant who has ejected him (plaintiff) from the tenure.

The defendant's answer was that the mokururee pottah set up by the plaintiff was a collusive document, and that there was no stipulation in the dur-putnee lease authorizing the dur-putneedar to grant any mokururee lease.

Both the lower Courts have dismissed the plaintiff's suit, holding that the alleged lease was not a *bonâ fide* document, and that the plaintiff not being a resident and hereditary cultivator, was not entitled to the benefit of Section 16, Act VIII of 1865 (B. C.)

Now, the terms of Section 16 are very precise and are as follows:—"The purchaser of an under-tenure sold under this "Act shall acquire it free of all incumbrances which may have accrued thereon by "any act of any holder of the said under-"tenure, his representatives or assignees, "unless the right of making such incum-"brances shall have been expressly vested "in the holder by the *written engagement* "under which his under-tenure was created "or by the subsequent written authority of "the person who created it, his representa-"tives or assignees. Provided that nothing "herein contained shall be held to entitle "the purchaser to eject khod-khast ryots "or resident and hereditary cultivators, nor "to cancel *bonâ fide* engagements made "with such class of ryots or cultivators "aforesaid by the late incumbent of the "under-tenure, or his representatives, except "it be proved in a regular suit, to be "brought by such purchaser for the adjust-"ment of his rent, that a higher rent would "have been demandable at the time such "engagements were contracted by his prede-"cessor. Nothing in this Section shall be "held to apply to the purchase of a tenure "by the previous holder thereof, through "whose default the tenure was brought to "sale."

Now it is quite clear from the above that the plaintiff in order to claim the benefit of the Section must prove either that he was a "resident and hereditary cultivator" of the identical tenure in dispute, which it is not proved in this case, or that the power to give the pottah was under an express agreement when the dur-putnee was created. This, it is admitted, is not the case here. Under such circumstances, the plaintiff is in no way entitled to the protection under Section 16.

It is urged that Section 16 only refers to the class of ryots. We have only to observe that the object of the law is to protect the lease-holder of the particular lands leased and not merely any one class of tenants.

The special appeal is dismissed with costs.

Mitter, J.—I am of the same opinion. The dur-putnee pottah contains no express provision authorizing the dur-putneedar to grant mokururee leases, and the mokururee title set up by the special appellant must therefore fall to the ground under the provisions of Section 16 Act VIII of 1865 (B. C.)

The second plea raised, *viz.*, that the plaintiff, special appellant, is a khod-khast ryot, is equally untenable. The expression "khod-khast ryots" as used in Section 16 Act VIII of 1865, evidently means "resident and hereditary cultivators," and it is clearly proved in this case that the special appellant is not a ryot of that description.

The special appeal must, therefore, be dismissed with costs.

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The 16th August 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson and G. C. Paul, *Judges.*

Act XVIII. 1869 Schedule I Art. 15—Ad valorem duty on conveyances—Rule of construction.

Reference to the High Court by the Officiating Secretary to the Board of Revenue, Lower Provinces, dated the 2nd August 1871.

The Port Canning Land Company, Limited, *Petitioners.*

Mr. H. C. Marindin for Petitioners.

No *ad valorem* stamp duty is payable under Act XVIII of 1869 upon a conveyance where the consideration consists of shares in a public Company made over to the vendor.

The word "amount" in Article 15 Schedule 1 of that Act signifies the sum total, or amount of money, forming the consideration, and the words "or secured" apply only to cases of mortgages and the like, not to an out and out conveyance.

If the express words of an Act do not warrant or necessitate a demand of duty or charge, it is not competent to a Court of law to extend such enactment or to give the words meaning beyond their strict and literal signification so as to include any case which may reasonably come within the spirit of the enactment.

Case.—THE circumstances of the case will be found fully detailed in the memorial presented to the Board of Revenue by the Directors of the Port Canning Land Company Limited on the 28th ultimo, and in the Indenture made between the Port Canning Land Investment Reclamation and Dock Company Limited, of the first part, Sadanund Bal Krishna, and Manockjee Rustomjee, Esq., Liquidators of the said Company, of the second part, and the Port Canning Land Company of the third part, forwarded herewith.

The point on which the decision of the High Court is requested is as to the stamp to be borne by the conveyance from the old to the new Company, by which it was agreed, among other things, that the Liquidators of the old Company should "transfer and sell "the lands, houses, hereditaments, moveable "and immoveable, and all other property, "assets, rights, credits, business things in "action, effects, and good will of the Port "Canning Land Investment Reclamation "and Dock Company Limited to the Port "Canning Land Company Limited, and should "receive in compensation for such transfer "and sale 6,000 shares of rupees 1,000 each "fully paid in such last mentioned Com-"pany."

Mr. Mackenzie, the Collector of Stamps in Calcutta, before whom the Solicitors to the old Company attended with a request that he would adjudicate as to the proper stamp required, certified under Section 39 of Act XVIII of 1869 that in his opinion the instrument required a stamp as a conveyance, the amount paid being taken to be the par value of the shares. Upon this the memorial herewith sent was presented, praying that the Collector's certificate might be revised by declaring that the instrument in question did not require an *ad valorem* stamp, or that in the event of the Board not feeling themselves at liberty to revise the Collector's certificate, the case might be referred to the High Court.

Having regard to the difference of opinion on the point and to the value at stake, Mr. Money has decided on adopting the latter course. In doing so, however, he desires to express his opinion that the Stamp Act of 1869 provides for such a case as the present, an opinion which is also held by the Advocate General of Bengal.

Under Article 15 Schedule 1 of that Act, the stamp on a conveyance is regulated by the amount paid or *secured*. In the present instance, the amount secured was 60 lacks of rupees, and though this was not to be paid in money, it was to be paid in a manner which admitted of money being realized,

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supposing the shares, which formed the consideration, remained marketable,—an event which must certainly have been contemplated at the time the agreement between the two Companies was entered into, otherwise there would have been no consideration at all.

The judgments of the High Court were delivered as follows:—

Norman, C. J.—This is a case stated for the opinion of the High Court by the Board of Revenue of the Lower Provinces under the 41st Section of Act XVIII of 1869.

The facts of the case are as follows:—The Port Canning Land Investment Reclamation and Dock Company Limited was a duly registered Company having its capital divided into shares. This Company on the 15th August 1870 passed a resolution that it should be wound up voluntarily. On the 2nd August 1870, the Port Canning Land Company Limited was duly registered as a Joint Stock Company. In the course of the liquidation and winding up of the Port Canning Land Investment Reclamation and Dock Company Limited, an agreement was made that the entire property of the Port Canning Land Investment Reclamation and Dock Company Limited should be sold, and transferred to the Port Canning Land Company Limited in consideration of six thousand 1,000 rupees shares in the latter Company. A conveyance was accordingly drawn up by which the first named Company, which I will call the old Company, purported to sell and convey to the second Company, which I will call the new Company, all the properties and effects of the old Company, in consideration of the new Company's having made over to the Liquidators of the old Company these six thousand shares of 1,000 rupees each fully paid up, the receipt whereof the Liquidators did thereby admit and acknowledge.

The Collector of Stamps in Calcutta was of opinion that this instrument ought to be stamped as a conveyance under Act XVIII of 1869, the amount paid or secured within the meaning of Clause 15, Schedule I, being taken to be the par value of the shares.

A petition was presented to the Board of Revenue on behalf of the Port Canning Land Company Limited, praying for a declaration that the instrument did not require to be stamped with an *ad valorem* stamp as proposed by the Collector. The Board of Revenue desired to express their opinion, in submitting the case to this Court, "that the amount secured was 60 "lacks of rupees, and though this amount "was not to be paid in money, it was to be "paid in a manner which admitted of money "being realized, supposing the shares which "formed the consideration remained market-"able,—an event which must certainly have "been contemplated at the time the agree-"ment between the two Companies was "entered into."

The Board of Revenue is not represented before us. But Mr. Marindin has appeared on behalf of the Port Canning Land Company Limited.

The question as to the liability of the conveyance to a stamp as upon a value of 60 lacks depends on the construction to be put upon the words of the 15th Clause of Schedule I, "Conveyance—when the amount paid or secured does not exceed rupees 50." Now, in construing that Clause I think it necessary to bear in mind the rule which is always to be applied in construing Acts of the Legislature which impose a tax, namely, that a duty or tax cannot be imposed except by clear and distinct words, and that the Acts which impose a tax or charge upon the subject cannot be extended by implication. If the express words of the enactment do not warrant or necessitate a demand of duty or charge, it is not competent to a Court of law in construing such enactment to extend it or to give the words a meaning beyond their strict and literal signification, so as to include any case which may reasonably come within the spirit of the enactment. This rule is laid down in a case cited by Mr. Marindin, reported in 6th Exchequer Reports, pages 464-479;—The Marquis of Chandos *versus* The Commissioner of Inland Revenue.

Now, it appears to me that the words "when the amount paid or secured exceeds 50 rupees but does not exceed 100 rupees," with a progressive duty for any amount beyond that sum, apply simply to *money* paid or secured. The word "value" is not found there. The word "amount" I understand to have a sense distinct from that of "value." The word "amount" as defined in Johnson's Dictionary is "the sum total, the result of several sums or quantities accumulated." In the Clause in question I understand it to signify the sum total or amount of *money*

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forming the consideration. I do not think that we should be at liberty to alter and extend the operation of that Clause by construing the word "amount" as "value." It is clear that a share in a public Company does not vest in the owner any definite part or proportion either of the money or of the property of that Company. A share in an incorporated or registered Joint Stock Company represents a certain right and interest in the Company—a right to call upon the artificial or incorporated person constituting the Company for an account—a right against the other shareholders to have the money and property of the Company applied in accordance with, and not otherwise than in accordance with, the terms of the articles of association or charter of incorporation,—and a right to a definite share or aliquot part of the profits when ascertained. But it does not entitle the proprietor to take and appropriate to his own use or for his own purposes any portion of that land and money of the Company. The fact that the shares in the present case are called 1,000 rupees shares does not make them securities for a thousand rupees. They are merely aliquot or fractional shares in the capital of the Company; such capital consisting of an aggregate which is supposed to be represented by a certain amount of stock. The money denomination represents merely the measure of a share-holder's liability. The value of his interest may be something widely different.

The English Act 13 and 14 Vict: Chapter 97, while imposing a duty on conveyances where the purchase or consideration money therein expressed does not exceed a certain sum, goes on to enact (see Schedule) that "where such consideration shall "consist either wholly or in part of any "stock or security, the value thereof re-"spectively to be ascertained as hereinafter "mentioned shall also be truly expressed "and set forth in manner aforesaid in or "upon every such deed or instrument; and "*such value shall be deemed and taken to* "*be the purchase or consideration money* "or part of the purchase or consideration "money, as the case may be, in respect "whereof the *ad valorem* duty shall be "charged as aforesaid. And where the "consideration or any part of the consider-"ation shall be any stock in any of the pub-"lic funds or any Government Debenture "or stock of the Bank of England or Bank "of Ireland or any debenture or stock of "any Corporation, Company, Society or per-"sons or person payable only at the will of "the debtor, the said duty shall be calculated "(taking the same respectively, whether "constituting the whole or a part only of "such consideration) according to the aver-"age selling price thereof respectively on "a day or on either of the ten days prece-"ding the day of the date of the deed or "instrument of conveyance, or if no sale "shall have taken place within such ten "days, then according to the average sell-"ing price thereof on the day of the last "preceding sale."

Now the Indian Act XVIII of 1869 contains no provision that the value of any *stock or security* shall be *deemed or taken to be* the consideration *money* or to represent the consideration *money*. It contains no provision whatever for a purchase in exchange for a share or shares in a public Company, nor does it contain any provision for ascertaining the value of such share or shares for the purpose of fixing the amount of an *ad valorem* stamp duty to be paid. If we were to hold that although the Indian Act contains no provision that shares shall be deemed and taken to be consideration money, nevertheless they must be deemed and taken to represent the consideration money, and as such liable to an *ad valorem* stamp duty calculated as upon the nominal amount of such shares, we should be requiring this Company in a case not provided for by the Act to pay an *ad valorem* stamp duty, estimated not according to the value of that which is given in exchange for the land, *viz.*, the real or present value of the shares, but according to the nominal amount of the shares, which is probably three times their value.

I think it plain that the Act XVIII of 1869 has not made any provision for an *ad valorem* stamp duty where the consideration of a conveyance consists of shares in a public Company made over to the vendor, and that being so, I must declare that, in my opinion, in such a case no *ad valorem* stamp duty is payable.

Macpherson, J.—The question referred is whether this instrument requires a stamp as a conveyance, the amount paid being taken to be the *par* value of the shares.

I agree in the opinion that the instrument does not require any such stamp.

Can it be said that "the amount paid" as consideration for the conveyance, is the *par*

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value of the shares which the sellers (of the property conveyed) are to have in the new Company ? The deed is a conveyance *out and out*; and under the words of Article 15 of Schedule 1 of the Stamp Act, it is "the amount paid" which alone has to be looked to, for the words "or secured" immediately following manifestly apply only to cases of mortgages and the like, and do not apply to a conveyance *out and out*, whatever the consideration for such conveyance may be. The case before us is not one in which property is conveyed or mortgaged in order to "secure" any thing: it is a case in which property is conveyed out and out, the consideration being a certain number of shares in a Company. The point is, is the property conveyed in consideration of an "amount paid,"—and if so, of *what* "amount paid ?"

It seems to me wholly impossible to say that because a number of shares of a certain nominal value are given as the consideration for a conveyance, the amount of the nominal value of the shares is "the amount paid." The nominal value is never necessarily much indication of the real value; and in the present instance, the real value may very possibly, not to say probably, be only a small proportion of the nominal value of the shares.

It is in truth impossible to say what is "the amount paid" for this conveyance, no sum of money being in fact paid or agreed or intended to be paid. Such a case as the one before us has not been provided for in Act XVIII of 1869, as it is in the English Statute. This being so, and as all stamp laws must be construed strictly, I think that a stamp, as if "the amount paid or secured" were sixty lacs, is not required to be paid as ruled by the Collector and the Board of Revenue.

Paul, J.—I concur in the answer proposed to be given to the question which has been submitted, namely, that the deed in question does not require an *ad valorem* stamp.

I consider the present case has been omitted from the provisions of Act XVIII of 1869. The word "amount" in Clause 15 Schedule 1 of that Act clearly means amount of money, and does not include or denote such a consideration as that expressed in the agreement entered into between the parties, namely, the old and new Company.

The 21st August 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Section 353 Act VIII. 1859—Evidence — Benamee conveyance — Proof of bona fides.

Case No. 48 of 1871.

Regular Appeal from a decision passed by the First Subordinate Judge of Shahabad, dated the 14*th December* 1870.

Bebee Zahrah and another (Plaintiffs) *Appellants,*

versus

Bhugwan Doss and others (Defendants) *Respondents.*

Mr. C. Gregory for Appellants.

Baboos Mohesh Chunder Chowdhry and *Hem Chunder Banerjee* for Respondents.

When parties have had an opportunity to put in such evidence as they consider sufficient to entitle them to a judgment upon the material issues of the case, the evidence ought to be held sufficient under Section 353, Civil Procedure Code, to enable the Appellate Court to pronounce a satisfactory judgment.

Where the *bona fides* of a conveyance is called into question, it is not sufficient for the claimant under such conveyance to give formal proof of the transactions involved, amounting simply to what might be expected if the transfer were benamee.

Jackson, J.—The subject matter of this suit is the proprietary right in a certain mouzah called Hookabeer Turkopoorwa in the district of Shahabad, to which the plaintiffs claim to be entitled under a kobalah from Ranee Bitchoo Kooer, the wife of a Rajah called Rajah Ram Prokash Singh, or the Rajah of Buxar.

The plaintiff's allegation was that this mouzah formerly belonged to the Rajah in question, and that the Rajah in the first instance created a mokururee thereof which he granted to a person named Kalika Pershad, and that he afterwards conveyed to his wife Ranee Bitchoo Kooer, his remaining rights or the *milkiut* in this mouzah

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for her maintenance; that the defendants, or some of them, holding decrees against the Rajah, caused his right title and interest in this mouzah to be put up for sale; that a claim by way of objection to the sale was put in by Ranee Bitchoo Kooer, and by the plaintiff, Zahrah, then holding a mortgage under this Ranee, setting up the gift by the Rajah which I have previously mentioned, and alleging that he had no rights whatever left in the mouzah; that this claim was thrown out by the Moonsiff in the execution proceedings on the 31st July 1869. It is alleged that Zahrah subsequently got a sale out and out of this property from the Ranee, and that Mussamut Muhesa Kooer was taken into partnership by her, and that they are consequently jointly entitled; and they bring this suit under Section 246 of the Code of Civil Procedure to establish their right to the mouzah. That is, extracting what I think are the merits of the case from a great deal of verbiage in the plaint, the real object of the suit.

The defendants, I may say, generally denied the alleged mokururee and the conveyance by the Rajah to his wife Ranee Bitchoo Kooer, that is, they denied that any *bonâ fide* mokururee or conveyance had been executed, although they did not question the formal execution of such documents: they alleged that the Rajah had, notwithstanding those documents, retained possession and enjoyed the ownership of the property from that time down to the time of sale, and therefore the sale was a good and valid sale, and that the plaintiff's suit ought to be dismissed.

The Subordinate Judge of Shahabad has taken a peculiar view of the allegations and of the issues to be tried. He framed several issues—one was, whether the law of limitation bars the suit or not; and that issue, I may say, referred to a portion of the relief which the plaintiff seemed to have asked for, namely, the cancellation of a certain bond said to have been executed by the Rajah, and also for the setting aside of a decree said to have been collusively obtained upon that bond. The second issue was whether the suit is premature or not; and then come the two issues on the merits.

The Subordinate Judge held, under the first issue, that so much of the suit as related to the cancellation of the bond and decree was barred by limitation, and as to the rest that the suit might proceed. He then held that the suit is not premature; but upon the second issue on the merits, namely, "whether the plaintiff's claim for "reversal of the said *oozurdaree* and sale "of the 31st July 1869 is just and adjudg-"able, or not," he seems to have been of opinion that "the plaintiff's alleged grounds "of claim above stated are *ipso facto* not "legal grounds." He then went on to say—"Section 257 of the Act does not authorise "the institution of an original suit to set "aside or reverse an *oozurdaree* order, "but merely to bring a suit for establishing "a right of property or possession thereof, "such as is not the plaintiff's claim in the "present suit." Upon the whole, therefore, he says—"I hold that the aforesaid remain-"ing claims of plaintiffs (*viz.*, for reversal of "*oozurdaree* order and of judicial sale) being "illegal and inadmissible as groundless must "be dismissed." Accordingly he dismissed the suit.

This having been the decision of the Court below, it has devolved upon us to try this case originally.

Mr. Gregory for the appellant contended that we ought to remit the case for a new trial under the provisions of Section 351; but it seems to me that the case is one which we ought to deal with under Section 353, that is to say, that the evidence on the record of the Lower Court being sufficient to enable the Appellate Court to pronounce a satisfactory judgment, we are bound finally to determine the case; and it seems to me, under that Section, that when parties have had an opportunity of putting in such evidence as they consider sufficient to entitle them to judgment upon the material issues of the case, we ought then to hold that the evidence is sufficient to enable us to pronounce a satisfactory judgment. Now, Mr. Gregory contended that his client had been prejudiced by the lower Court having disposed of the case upon a preliminary point, and I asked him to state what evidence had been excluded by the decision of the Court below upon the question of limitation; but he was unable to specify any evidence which had been so excluded. Indeed, after laying before us the evidence of the plaintiff, Mr. Gregory contended that the evidence was such as to entitle him to judgment. We think, therefore, that the case is in such a condition that we ought to go on to determine it upon the evidence adduced by

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the parties. It remains for us to consider whether the plaintiffs have sufficiently proved their case to entitle them to a decree.

The object of the suit was to establish the plaintiffs' right, and the necessity for establishing that right arose out of an order of the Moonsiff's Court rejecting a claim of the plaintiff Zahrah, that claim being based upon the allegation that this plaintiff was, at the time of the attachment of this property, in possession thereof as her own property and not on account of or in trust for any other person.

That being the case, it was not sufficient for the plaintiff merely to give formal proof of the transfer and transactions mentioned in the plaint; it was not sufficient to start a case and throw it upon the opposite party to rebut that case, but it was necessary to go the length of proving that the title under which plaintiff claims was a *bonâ fide* genuine title.

Now the circumstances before us are that the Rajah, being a person much indebted (for both parties concur in stating this, and also that he was not scrupulous as to the mode in which he dealt with his property) had made a *bonâ fide* and honest conveyance to his wife for her maintenance. In the circumstances of this case, we have nothing to do with the alleged mokurruree: the only matter before us is whether the Rajah really did retain or had transferred to his wife, the Ranee, the remaining proprietary right in this mouzah.

Now what evidence is given to show that the Rajah had really transferred his proprietary right. We have witnesses who say that the Ranee's name was put upon the village papers; we have persons who say that a document conveying the property to her was executed; we have persons saying that the collections were made in her name and the money remitted to her; but we have not a single witness brought forward to show that the Ranee ever actually received such monies, or what she did with them; we have not a single person who gives a reasonable account of the transaction between the Rajah and his wife, or of the circumstances under which the Rajah considered himself under the necessity of providing for her maintenance. The evidence given for the plaintiff is simply of that formal kind and amounts simply to proof of the facts which we should expect to find in evidence if the transactions were of a benamee character. It seems to me that the situation in which the Rajah found himself was precisely the sort of situation in which a benamee transfer would have taken place and in which a *bonâ fide* assignment of this property for the support of his wife would not have taken place

I think, on the whole circumstances of the case, the plaintiffs were far from making out any case on which we could give a decree declaring the plaintiffs' right, and consequently the plaintiffs' suit must be dismissed.

This appeal, therefore, is dismissed with costs.

Macpherson, J.—I also think that the appeal ought to be dismissed. The main issue in the case was whether by the deed of gift, dated the 25th June 1864, this property really passed from the Rajah of Buxar to his wife, Ranee Bitchoo Kooer. This issue was expressly fixed in the lower Court, and it is quite clear that the parties did seriously address themselves to it and went fully into evidence upon it. That being so, I think there is no doubt that we are right in deciding and are bound to decide the case ourselves. There is really no reason whatever for sending the case back to the lower Court upon the ground that the parties had not a full opportunity of going into evidence. They had a full opportunity.

In the circumstances of this case, it was not sufficient for the plaintiff to give mere formal proof of the property having passed to Ranee Bitchoo Kooer, and I think that the evidence does not go farther than to prove a merely formal transfer to her.

The 21st August 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Stamps—Article 17 Schedule 2 Court Fees' Act, 1870.

Case No. 99 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 5th April 1871.

Dinobundhoo Chowdhry (Plaintiff) *Appellant,*

versus

Raj Mohinee Chowdhrain (Defendant) *Respondent.*

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Baboo Sreenath Doss for Appellant.

Baboos Kalee Mohun Doss and *Grija Sunkur Mojoomdar* for Respondent.

A plaint to have a summary order set aside, to have a will declared to be genuine, and to be retained in possession of the pro erty of the deceased, was held to be one for consequential relief and one not coming under Article 17 Schedule 2 Act VII of 1870.

Kemp. J.—THIS appeal turns upon the question whether the lower Court was right in rejecting the plaint in the suit because it was not sufficiently stamped. The appeal to this Court is that this suit was sufficiently stamped under Clause 3 Article 17 of Schedule 2 Act VII of 1870. That Clause is to the following effect:—"To obtain a declaratory decree where no consequential relief is prayed, the proper fee is 10 rupees." The amount of property involved in this suit is said to be rupees 46,102. The plaintiff states that his elder brother executed a will under which his widow, the defendant Raj Mohinee, was set aside, and the properties in dispute, moveable and immoveable, belonging to the estate of the deceased, were devised to the plaintiff. His suit is to have a summary order of this Court, dated the 13th July 1870, set aside; to have the will of his late brother declared to be genuine; and to be retained in possession of the moveable and immoveable property left by his brother.

There can be no doubt, we think, that a plaint of this description does contemplate and expect that the Court will give consequential relief. It is a case in which if the plaintiff gets a decree, an application to execute that decree in the form of retaining the plaintiff in possession may be made and process in execution taken out. We, therefore, think that the lower Court was right in rejecting the plaint as improperly stamped, and dismiss the appeal with costs.

The 22nd August 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Reversioner—Right of action—Declaratory decree—Act XXVII of 1860—Res adjudicata.

Case No. 53 of 1871.

Regular Appeal from a decision passed by the Judge of Moorshedabad, dated the 7th December 1870.

Anund Mohun Moulick (Plaintiff) *Appellant*,

versus

Indro Monee Chowdhrain and others (Defendants) *Respondents*.

Baboo Umbika Churn Banerjee for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondents.

A party, who, subject to the life interest of his mother, has a real and *vested* interest in remainder such as a Hindoo has the power of creating, has a right to sue to obtain a declaration of the invalidity of a will set up to his prejudice, which purports to take away altogether his future right and interest in the property.

A decision under Act XXVII of 1860 does not in any way preclude the unsuccessful party from contesting the validity of the will in a regular suit.

Norman, C. J.—IT appears to us that this is a very plain case.

The plaintiff brings a suit alleging that his father Gopal Lall Moulick died on the 2nd Kartick 1275—which would be in October 1868—leaving behind him the plaintiff Anund Mohun Moulick, Kristo Mohun Moulick, his sons, and the defendants Bungo Nath Moulick, Sree Nath Moulick, Huree Nath Moulick, and Doyaro Nath Moulick, his grandsons as heirs; that Gopal Lall Moulick, his father, executed a will on the 18th Chyet 1261 to the effect that all his estate both of land and money should on his death go to the possession of Indro Monee Chowdhrain, his widow, the mother of the plaintiff for her life, and that after her death the property should go to the heirs of Gopal Lall Moulick conformably to the terms of that will. The will provided that on the death of his mother, the plaintiff who

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was the third son of Gopal Lall Moulick should inherit jointly with the other co-sharers. The plaintiff says that after the death of his father, his mother Indro Monee Chowdhrain applied to the Civil Court of Nuddea, under Act XXVII of 1860, for a certificate for collecting the assets due to the estate of her husband; and she put in two wills, one of the 9th Magh 1269 and the other of the 16th Assar 1275, which she alleged to have been executed by her husband Gopal Lall Moulick.

On the 30th June 1869, the Judge of Nuddea made an order granting a certificate to Indro Monee Chowdhrain.

The plaintiff says that the two wills of Magh 1269 and Assar 1275 were not really executed; that his father was of extreme old age suffering from a giddiness of the head and mental derangement at the time that the wills were alleged to have been executed. He said that the two wills were got up by fraud by the first defendant, his mother, in collusion with other defendants, and the suit is therefore brought by the plaintiff "for the cancelment of the said "wills, and for reversal of the order passed "for granting a certificate based upon the "said wills."

The Judge of Moorshedabad has dismissed the suit without going into the evidence because, he says, the plaintiff has on his own showing "merely a contingent right of "inheritance dependent on the death of the "defendant No. 1 (Indro Monee Chow-"dhrain) and he has no right to sue for a "declaratory decree against her in the ab-"sence of any alienation or waste on her "part."

He says that the plaintiff is not entitled to sue to set aside the certificate, because, upon the admission contained in the plaint, the defendant Indro Monee Chowdhrain is entitled to a certificate. And, thirdly, he says that the suit is barred under Section 2 of the Civil Procedure Code because the question as to the validity of the wills was heard and determined in the proceedings under Act XXVII of 1860.

On the principal ground on which the suit has been dismissed, we are unable to agree with the Judge.

In the first place, the will admitted and put forward by the plaintiff, while it gives a life interest to his mother Indro Monee Chowdhrain, does not show that the plaintiff has merely a *contingent* right. On the contrary, subject to the life interest of his mother, he has a real and *vested* interest in remainder such as according to the rulings of the highest Court of appeal a Hindoo has the power of creating (*see* Rewan Pershad *versus* Radha Bibee, Moore's Indian Appeals, Volume IV, page 137.)*

That being so, and the plaintiff claiming to have a *vested* interest in remainder on the death of his mother Indro Monee Chowdhrain, we think that he has a right to sue to obtain a declaration that a will set up by his mother and his brothers to his prejudice, and which purports to take away from him altogether his future right and interest in the property of his father is invalid and was not executed by the alleged testator; that the alleged testator was not in a condition to understand, and in fact did not understand nor execute the will; and that such will was procured in fraud and collusion on the part of his mother and brothers;—on the same principle as a Hindoo heir in expectancy being the immediate heir in reversion after the death of a widow is entitled to sue to set aside an adoption, or to have it declared that the *Onoomotee puttro* under which such adoption was made is invalid and of no avail. See IX Weekly Reporter, p. 463, and other cases cited in Macpherson's Civil Procedure, last edition, page 63.

And in our opinion, it would be very unfortunate if it were not so. The widow and brothers have put forward the two wills in the most public way in which they could have been put forward, namely, by obtaining a certificate founded upon them; and if the plaintiff now remains quiet they may create or attempt to create rights by alienating the property or portions of it, to the prejudice of the plaintiff.

The widow may live for many years: she may live to a time when all the witnesses who could speak to the circumstances under which the will was executed had died; and at such remote period the plaintiff might find himself unable to prove the case on which he founds his claim.

On the second question, we think that the prayer of the plaintiff to set aside the certificate may be treated as immaterial.

On the third question, our opinion is that the decision under Act XXVII of 1860 does

* 7 W. R., P. C., p. 35.

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not in any way preclude the unsuccessful party from contesting the validity of the will in a regular suit.

This point has in fact been determined in several cases ;—see for instance Mahomed Azeemoollah Khan *versus* Mussamut Suboora Bibee, Weekly Reporter, 1864, page 227.

For these reasons, the decision of the Judge of Moorshedabad must be reversed, and the case remanded to him for trial on the merits.

Costs will follow the event.

The 22nd August 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Enhancement of rent—Jurisdiction—Act VIII (B. C.) 1869.

Cases Nos. 534 to 536 of 1871.

Special Appeals from a decision passed by the Judge of Hooghly, dated the 14th February 1871, *affirming a decision of the Moonsiff of Sulkea, dated the 28th November* 1870.

Brojonath Koondoo Chowdhry and others (Plaintiffs) *Appellants,*

versus

A. Stewart (Defendant) *Respondent.*

Baboos Kalee Prosunno Dutt and *Mohendro Lall Seal* for Appellants.

Baboos Sham Lall Mitter and *Umurendro Nath Chatterjee* for Respondent.

A suit for enhancement of rent on the ground of increased value of the land by reason of the existence of a distillery, the said increase of value not being attributable to any of the causes specified in Section 17 Act X of 1859, will not lie under Act VIII (B. C.) of 1869.

Paul, J.—THESE cases have taken unusual time in argument, but in fact there is very little to be said in them. The facts are shortly these :—

The plaintiff, who is not the original zemindar but the representative of the original zemindar, and has recently come into possession of the zemindaree within which the lands in dispute are situated, has chosen to institute this highly speculative suit without making due and proper enquiry, and he has attempted to support it by false allegations and false suggestions. It would be sufficient, for the purposes of this judgment, to point out those false allegations and false suggestions, and then to dismiss the suit.

The admitted facts of the case are these :—that some time, as far back as the year 1845-46 or 1847 not precisely disclosed, Messrs. Fergusson and Co. erected a Rum Distillery at Bally upon about 3 beegahs of land ; that the whole of the 3 beegahs of land was surrounded by a wall and constituted the house and premises of this Rum Distillery ; that continuously from the time of its erection down to the institution of this suit on the 24th July 1870 during a period of 25 years, the defendant in possession, and his predecessors have paid a fixed rent of rupees 22 a year in respect of the premises occupied by them as this Rum Manufactory. The plaint, however, on its face, sets out a state of facts which by no construction whatever would embrace the particular facts to which I have alluded, *viz.*, that the locality in question has been built upon and is now occupied by a Rum Distillery. The plaint alleges that the defendant by right of a cultivating jote is in possession of 3 or 4 beegahs of land, in respect of which he is in the habit of paying at a certain rate per beegah which is less than the prevailing rate paid by the same class of tenants, *viz.*, cultivating tenants, for lands of a similar description and with similar advantages in the neighbourhood ; and that consequently the plaintiff is entitled to enhance the rent paid by such cultivating ryot to the extent of the prevailing rate, *viz.*, from rupees 22 to rupees 276, or at the rate of rupees 20 per beegah ; and further that the lands held by the defendant as cultivating ryot are greater in extent than the quantity of land for which rent has been paid.

Now, we have no hesitation in saying that the facts mentioned in the plaint are false. The defendant has never been a cultivating ryot, because it is clear that he and his predecessors have had uninterrupted possession for 25 years of the Rum Distillery at a fixed rate of rent. Assuming, however, that the term "jote" includes atenure of that de-

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scription, the allegation that ryots of the same class, *viz.*, ryots who own Rum Distilleries, pay for similar lands at a higher rate of rent, is wholly false, for this is admitted to be the only Rum Distillery in and about the locality in question. Therefore, whether it be taken that the plaint intended to charge a liability upon the defendant on the ground of his being a cultivating ryot, or as an occupier of land by reason of the building imposed on it, in either view the allegations in the plaint are false; and the present attempt to enhance the rent of a party whose rent is apparently not enhancible, by reason of an artfully concocted plaint, is, to say the least, highly reprehensible. If we were to stop here, we might fairly dismiss the plaintiff's suit without passing any opinion on the merits, because the plaint itself discloses a state of facts sufficient to justify the dismissal of the suit without entering into the merits of the case. The Lower Courts, however, have not taken this view of the case. They have decided that the land occupied by the defendant was used for building purposes, and therefore a suit for enhanced rent was not maintainable.

This finding has been challenged in special appeal upon the ground that there is no evidence whatever on the record to justify such a finding.

The defendant produced a mokurruree pottah of the execution of which no evidence was given in the first Court. Whether that pottah was actually questioned in the first Court or not does not appear. Probably, if that pottah had been distinctly challenged in the first Court, the defendant would have had no difficulty in proving it, because it appears to be an old document and connected with a great many English title-deeds produced in Court. However, this mokurruree pottah has all the appearance of genuineness, and its authenticity is corroborated by the broad facts of the case; and if it had been necessary to determine the case on the merits of this document, we should have given the defendant an opportunity of proving it. While, on the one hand, we admit that this document is not legally proved, we cannot shut our eyes to the fact that it exists, that it has been placed on the record, and that it naturally accounts for the expenditure of a large capital on the lands in suit.

The first Court has come to a very proper conclusion on the facts of the case. It says with reference to the first issue:—"It "is to be observed that the three plots of "land were originally let to Messrs. Fergusson and Co. and Messrs. Burn and "Co., who built thereon a Rum Distillery "generally known under the name of Bally "Rum Distillery; that the entire plot was "almost surrounded by a brick-built wall. "It also appears that the plaintiffs and those "under whom they claim continued to "receive the old rent without objection or "claim to enhance. This circumstance no "doubt might lead to the inference that the "grant of the land was for the purpose for "which it was used," and then the Court goes on to state that the plaintiff made no attempt to show that the land was let for agricultural or horticultural purposes. Now, here the Court draws what appears to us a very fair inference from two admitted facts, *viz.*, that since the lease was taken by Messrs. Fergusson and Co. the rum manufactory had been built upon the land and built without objection on the part of the zemindar; and that the plaintiff continued to receive the same rent all along without objection or claim for enhancement. To show that such an inference is quite right, I will refer to Weekly Reporter, Volume XII, page 496, where the late Chief Justice Sir Barnes Peacock refers to the remarks of Mr. Justice Kemp which he quotes with approbation. He says: "Mr. Justice "Kemp thinks that in equity plaintiff was not "entitled to turn the defendants out of the "land because he stood by and saw them "erecting pucca buildings on the land without any objection whatever. If he allowed "the defendants to erect pucca buildings "upon the land without objecting, it appears "to me that he was bound in the same way "in equity as if he had granted them a "pottah with the privilege of building pucca "houses on the land, and I think that "Mr. Justice Kemp is right in holding that "the plaintiff was precluded by his conduct "from turning the defendants out of possession."

The inference, therefore, seems reasonable and fair that the land was let for building purposes, and it really seems unlikely that the buildings should have been erected without the consent of the landlord previously obtained. The two lower Courts are of opinion under these circumstances that this suit will not lie under Act VIII of 1869.

This is a suit for enhancement of rent of land covered with a building, the

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enhancement being attributable to the increased value of the land by reason of the distillery existing thereon, and not being attributable to any one of the three causes specified in Section 17 which clearly relate to lands let out for agricultural purposes. Having regard to this view of the case, we consider the Lower Appellate Court was right in determining that the present suit would not lie under Act VIII of 1869.

Taking into consideration the fact that a large amount of capital was expended on the erection of this Rum Distillery, it is almost impossible to believe there was not any express understanding existing at the time authorizing the erection of this manufactory, and the existence of a specific understanding or agreement is suggested by the existence of the lease on the records of the case. The right of the parties must depend on the arrangement which took place at the time the original lessees entered into possession and took up these lands for building purposes. As to what was the precise arrangement we have no evidence, and the plaintiff has wholly ignored it. Even assuming that this suit for enhancement will lie, it will be impossible under the circumstances stated to say whether the plaintiff is entitled to enhance the rent of the land on which the house is built. The real facts of the case ought to have been alleged and proved in order to obtain a decision on the subject of enhancement. Instead of such a case being stated, a case purely hypothetical in character has been put forward by the plaintiff; and I consider such a case is righteously met by a dismissal of it with all costs.

As to the question of lakheraj lands, it has not been seriously pressed. There is no proof whatever that the plaintiff received any rent on account of these lands, and the Court has found as a fact that the land is lakheraj.

The special appeal is dismissed with costs.

Bayley, J.—I quite concur. I think it is a simple attempt on the part of the plaintiff to enhance the rent by a side wind as it were under the words of Section 17 as if for ordinary culturable lands, which under the circumstances and the finding of fact on the evidence, with which we cannot interfere in special appeal, he had no right to do; and the plaintiff has no right whatever to enhance except under an express contract to that effect.

The 22nd August 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Examination of Pleaders—Issues.

Case No. 484 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 27th January 1871, affirming a decision of the Moonsiff of Doobrajpore, dated the 30th May 1870.

Man Gobind Sircar (Defendant) *Appellant,*

versus

Umbika Monee Dossia and others (Plaintiffs) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Where a plaint discloses no cause of action, a Court is justified in examining the Pleaders on both sides, and from their examination eliciting and fixing the real issue and determining the case on the trial of such issue.

Kemp, J.—The defendant is the special appellant in this case. The plaintiff's suit was that Ram Soonder and Ram Narain Sircar were in possession of 14 beegahs 14 cottahs of land paying a jumma of rupees 28; that the zemindar Nund Coomar Gossain sued for the rent of that land for the years 1273 and 1274 and obtained a decree; that on the property being put up for sale the defendant, to save it from sale, made a deposit in the Collectorate under the provisions of Bengal Act VIII of 1865; that the Collector issued an order to put the defendant in possession, but that in truth that order was never carried out; the defendant never got possession and the plaintiffs remained as before in possession. The suit was brought for confirmation of the possession of the plaintiffs on establishing their title. Subsequently, the Court finding that the plaint disclosed no cause of action examined the pleader for the plaintiffs and he distinctly stated that the title upon which his clients came into Court was the title acquired by Ram Narain and Ram Soonder.

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The defendant's case was that the property was not acquired by Ram Narain and Ram Soonder, but was acquired by Rama Nund Sircar. The defendant then set forth the genealogical tree of the family and showed that as the heir of Ram Doyal, he was entitled to a 5 annas 6 gundahs 2 cowries 2 krants share in the property, and as the heir of Gooroo Churn to another 5 annas 6 gundahs 2 cowries 2 krants, or in all 10 annas 13 gundahs 1 cowrie 1 krant; that he had a right to make the deposit in the Collectorate inasmuch as he had an interest to protect; and that therefore the plaintiff's suit ought to be dismissed unless he pays the sum advanced or proves in a regular suit that the advance made by the defendant has been realized from the usufruct.

The first Court raised certain issues: 1st, whether the suit has been properly valued; 2nd, whether the suit was cognizable by his Court; 3rd, whether the plaintiff could derive any benefit in this suit if it were found that the money due to the defendant on account of his deposit has not yet been liquidated and who was in possession of the land; and then came the real issue in the case, namely, whether the land claimed was the right of Ram Narain and Ram Soonder as a self-acquisition, or whether, as stated by the defendant, it had been acquired by Rama Nund Sircar. Now, this issue was found by both Courts in favour of the defendant: it was clearly found that the defendant's title was proved, but both Courts found that as the plaintiff had been in possession for more than 12 years the suit of the plaintiff must be decreed.

In special appeal, it is contended that the title upon which the plaintiff came into Court not having been proved, both the lower Courts have committed an error in law in not dismissing the plaintiff's suit.

We think that this contention is correct, and that the decisions of the lower Courts must be reversed. On turning to the plaint, we find that there is really no cause of action disclosed in the plaint. The plaint simply says that Ram Soonder and Ram Narain were in possession, but it is not said how they were in possession, or how that possession was acquired by them. Then the plaint goes on to say that the defendant was not in possession; that the Collector's order was never carried out and the defendant never put in possession under it; and therefore taking the plaint alone, there was no cause of action disclosed in it and the plaintiff's suit ought to have been dismissed; but as already observed, the Court below, and properly so, on finding that there was no cause of action disclosed in the plaint, examined the pleaders on both sides and from their examination the real issue in the case was elicited and fixed, and that issue being, as already observed, whether the plaintiff's title was made out, namely, whether the property was acquired by Ram Narain and Ram Soonder as stated by the plaintiff, or whether the allegation of the defendant that the property had been acquired by Rama Nund, the common ancestor of both parties, was proved; and that issue having been found in favour of the defendant, the plaintiff's case ought to have been dismissed. There is no doubt that, as a general proposition, when a suit is brought for confirmation of possession under a certain title, the plaintiff is bound by the title which he sets up; but also as observed in a decision to be found in Volume XII, Weekly Reporter, page 430, by Mr. Justice Markby, it is otherwise when a plaintiff sues to recover immoveable property from which he has been ousted. In this case, if the plaintiff had framed his suit on the footing that the defendant had ousted him under the order of the Collector and had obtained possession, then no doubt the question whether the plaintiff had been in possession for 12 years would have been a material question. Taking the plaint alone, it disclosed no cause of action. Taking it as amended by the issue raised after examination of the pleaders, the plaintiff having failed to prove the title on which he came into Court, and both Courts having found concurrently that the defendant had proved his title, the plaintiff cannot succeed. We, therefore, dismiss his suit and decree this appeal with all costs.

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The 22nd August 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Admissions — Examination of Parties.

Case No. 411 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of East-Burdwan, dated the 5th January 1871, *reversing a decision of the Moonsiff of Aosgram, dated the 17th February* 1870.

Shaikh Komurooddeen (one of the Plaintiffs) *Appellant,*

versus

Shaikh Monye Mundul *alias* Kuleemooddeen Mundul (Defendant) *Respondent.*

Baboo Romesh Chunder Bose for Appellant.

Baboo Romanath Bose for Respondent.

A copy of a defendant's deposition in a former suit having been put in by plaintiff at a late stage of the case, when defendant had no means of explaining away any supposed admission therein:

HELD, that the first Court was wrong in accepting the same as an admission binding on defendant and that the Lower Appellate Court was right in sending for the defendant and examining him on the subject.

Kemp, J.—THIS was a suit brought to recover possession of a 7 annas share in certain lakheraj lands and tanks. The plaintiff alleges that he purchased the aforesaid share from one Rujub Bibee, and on going to take possession he was resisted by the defendant Monye Mundul, and therefore he brought this suit for possession. The defendant states that Rujub Bibee's husband was not the proprietor of a 7 annas share of the property in dispute, but of a 2 annas 13 gundahs 1 cowree 1 krant share, which latter share Rujub Bibee's husband sold to the defendant's father in the year 1259 and that from that time up to the time the suit was instituted, the defendant's father and after him the defendant being in possession, the suit is barred.

The first Court gave the plaintiff a modified decree for 2 annas 13 gundas 1 cowree 1 krant.

The plaintiff contented with that decree, preferred no appeal. The defendant appealed to the Subordinate Judge who has reversed the decision of the first Court.

The Subordinate Judge in the first place finds that by the evidence of the witnesses who were examined at the first hearing of the suit, as well as by the evidence of the witnesses examined on the remand, it has been proved that the defendant's father purchased a 2 annas 13 gundahs 1 cowree 1 krant share in the property from Rujub Bibee's husband. He also found that the evidence of the witnesses for the plaintiff was false, and that the defendant had been in possession ever since the date of the kobalah in 1259 or for more than 12 years prior to the present suit, and therefore that the plaintiff's claim is barred. He also says that the Moonsiff was wrong in referring to a copy of a former deposition of the defendant; that as the defendant is yet alive, he ought to have had an opportunity given him of explaining away any admission which the plaintiff sought to bind him by; he further held that there was nothing even in the copy of that deposition to show that the lands which were the subject of the claim in that suit are the lands included in the present suit. He went further and sent for the defendant and examined him and found after examining him that it is clear that the lands in the claim-suit are separate from those now sued for.

We may also observe that this supposed admission of the defendant in the claim-suit was put in at a late stage of the case after the defendant had put in his written statement and he had no means of explaining away any supposed admission. The Moonsiff was, therefore, entirely wrong in accepting this copy of the defendant's deposition as an admission binding on him, and the Subordinate Judge was perfectly right in sending for the defendant and examining him; and he has come to a conclusion of fact on that examination that the lands are not the same as those claimed in the claim-suit. It appears that that claim-suit referred to 2 cottahs of land, and it may be that the plaintiff's vendor Rujub Bibee and the defendant had a joint interest in these 2 cottahs which they sold 7 or 8 years prior to this suit, but it does not follow that they had a joint interest in the remaining 24 beegahs.

We dismiss the special appeal with costs.

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The 24th August 1871.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Joint Hindoo Family—Ancestral property—Legal necessity—Purchaser.

Case No. 135 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 31*st December* 1870, *reversing a decision of the Subordinate Judge of that District, dated the* 31*st March* 1870.

Mohabeer Kooer and others (three of the Defendants) *Appellants,*

versus

Joobha Singh and another (Plaintiffs) *Respondents.*

Baboos Unnoda Pershad Banerjee and Chunder Madhub Ghose for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where, in consequence of a dispute as to the succession to joint property, a compromise was come to among the members of a Hindoo family by which the property was divided between them, it was held that each of the different members took the property not as ancestral property, but as a definite share which became his in pursuance of an agreement, and which therefore became his own absolute property.

Where ancestral property is sold on the plea of necessity, it is sufficient for the purchaser to be satisfied of the fact of necessity: he need not inquire into its causes.

Jackson, J.—This is one of those suits so common in the districts of Behar, and which, we must say, form a very unfavorable feature in the litigation of those districts. It was a suit by Hindoo sons, in the lifetime of their father, to set aside alienations made by the father in consequence of obligations incurred by him, and to recover immediate possession of a portion of the property, with a declaration of their right to the remainder of it on the death of their father.

The transactions are of extremely recent date, namely, of April 1863 and April 1866; and the present suit was commenced in 1869. But it appears that this suit was not the first of the proceedings taken with the view of asserting the rights of these plaintiffs, but that during their minority suits had been previously commenced in their behalf by their guardians; so that the ink was scarcely dry on the sales which conveyed the property to the defendants on the part of the father before the plaintiffs came into Court to undo that which had been done.

The property in dispute was an 8 pie share of Puttee Khoord in Mouzah Sydpore *alias* Manna. The suit was dismissed by the Subordinate Judge, but on appeal the Zillah Judge reversed that judgment and gave the plaintiffs a decree.

The principal questions raised before us in special appeal have been whether the property in question came under the category of ancestral or family property, so that the plaintiffs' father being under the Mitakshara Law was incapable of disposing of it; and secondly, whether the defendants had sufficiently made out the existence of legal necessity supposing that the father was not the absolute owner.

The Judge upon the question of ancestral property merely says this:—"I do not think it very much matters for the purposes of this suit, whether the property was purchased by Ajeet Singh or his son Bhekdharee Singh; the property would in either case be ancestral as far as Khejoo Singh was concerned." He then goes on to show that Khejoo, the father of the plaintiffs, had got into possession of this property as an heir either of Bhekdharee or Ajeet Singh.

Now the decision of the Judge upon this point involves a question of some nicety under the Hindoo Law. The Judge seems to consider that any property that came into the hands of a man by way of inheritance is ancestral property such as to give to the son of that man on his birth a joint right and interest in such property. We confess that, after reading through several verses in the 1st and 5th Sections of Chapter I of the Mitakshara, we have considerable doubt whether that is a correct view.

The property in question seems to have been purchased at a revenue sale by one Bhekdharee, who was the son of Ajeet. Khejoo, the father of the plaintiffs, was second in descent from Oogra, the brother of Ajeet, and was, therefore, the son of Bhekdharee's first cousin. Bhekdharee, it appears, predeceased his father Ajeet, and upon the death of Ajeet some dispute appears to

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have arisen in regard to the succession to this and other property, and proceedings were commenced in the Civil Court, but they terminated in a compromise under which an ultimate division of the whole of the property was agreed upon in these terms —that the branch of Jiwon Singh, who was another brother of Ajeet, should take half of the property. and that the other half should be divided in equal thirds between this Khejoo and the son and the grandson of another son of Oogra. In respect of a portion of the property in dispute the division was to take effect immediately, but as to the property now in question it was to remain for her lifetime in possession of Khejoo's widow and after her death to be divided in like manner.

Now, without expressing any very decided opinion as to what under the Section and Verses quoted constitutes ancestral property, although my own mind inclines to the opinion that the kind of property in respect of which a man's son by birth obtains an equal right with himself is property which has come to that man from his father and grandfather; but without expressing any final opinion upon that point, it seems to us sufficient for the purposes of this case to hold that by the operation of that agreement between the different members of this family Khejoo Singh took this property not as ancestral property but as a definite share which became his in pursuance of an agreement previously come to by the members of the family, and which therefore became his own absolute property.

In this point of view we do not consider the plaintiffs were entitled to call in question the alienations by Khejoo Singh. But even if they had been so entitled, it seems to us that the Judge has gone too far in allowing the exercise of that right. The Judge says :— "In a case of this nature when joint family property is concerned" (we have already stated that this was not joint family property, but that the several parties took and enjoyed separate and distinct shares) "it was necessary for the defendant to show that there was such necessity to raise money on the zur-i-peshgee as well as to borrow under the bond as to justify the sale. First as to the sale, the Subordinate Judge in his judgment makes the debt to commence from the date of the bond in favor of Bunwaree Lall, but that is not correct. I think he should have gone further back to see the original cause of the debt."

So that, according to the Judge, if family embarrassment exists such as is about to cause the sale of valuable landed property, it is not sufficient to entitle the purchaser to relief that he should show the existence of such embarrassment, but he must enquire into the circumstances connected with that debt, must go into the history of the matter in which the embarrassment originated and trace back the whole claim of transactions from the beginning. We think that is going too far and is not borne out by the decisions of the Privy Council upon this point.

Upon all these considerations, it appears to us that the Judge had not sufficient ground for reversing the decision of the Court below, and that decision ought to stand and the decision of the Judge reversed with costs.

The 28th August 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Arrears of Revenue — Mortgagee's lien.

Case No. 518 of 1871.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 6th January 1871, *reversing a decision of the Moonsiff of that District, dated the 9th July* 1870.

Heera Lall Chowdhry (Defendant) *Appellant,*

versus

Janokeenath Mookerjee and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Bose for Appellant.

Baboo Umbika Churn Banerjee for Respondents.

When mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery.

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Norman, C. J.—THIS is a suit for a refund of a sum of rupees 205. The facts are as follows:—Gopal Churn Mookerjee executed a mortgage of a certain talook to the plaintiff's ancestor Rakhal Doss Mookerjee under a bond which was specially registered under Section 53 of the Indian Registration Act XX of 1866. The bond which bears date the 21st of March 1271 stipulated that the sum secured should be paid in Chyet 1277. It contained a proviso that "if the mortgage failed to produce his title "deeds within 15 days of the date of the "deed or if the property was sold for arrears "of revenue, the money should then be pay-"able at once."

It seems that no title deeds were produced within 15 days, and the property mortgaged was sold for arrears of Government revenue on the 25th March 1868 or 13th Chyet 1274.

Rakhal Doss Mookerjee, the plaintiff's predecessor in title, sued in the Subordinate Judge's Court for a summary decree under Act XX of 1866 upon this bond. He prayed for a declaration of his right to draw the money out of the Collectorate, and that in execution of that decree the money lodged in Court, the surplus proceeds of sale of the mortgaged property, should be paid over to him.

In execution of that decree, Rakhal Doss attached the surplus proceeds of sale in the Collector's Court. After that attachment, the defendant in the present suit, Heera Lall Chowdhry, brought a suit against Gopal Churn in the Court of Small Causes. He obtained a decree, and in execution of that decree he attached the surplus proceeds of the sale of the property in the Collector's Court and obtained out of the sale proceeds the sum of rupees 205 in satisfaction of his decree.

In the present suit, the plaintiff, who is the representative of the mortgagee Rakhal Doss, prays for a decree declaring his prior right to this sum, and for a refund of it.

The Additional Judge of Nuddea, Mr. Pepper, reversing the Moonsiff's decision, made a decree in favor of the plaintiff declaring him entitled to the amount drawn by the defendant from the Collector's Court.

From that decision an appeal has been preferred to this Court, and on that special appeal many questions, no doubt, of importance have been raised, and, if necessary, it would have been argued that a suit on the mortgage bond in question was not one which under Section 55 Act XX of 1866 could be maintained as a summary suit. But there is an answer—as appears to me a short answer—to the claim put forward by the appellant.

The property mortgaged by the registered bond was subject to a lien for the amount of the money secured by that instrument; and it has been long settled by decisions from the time of the late Sudder Court, in consonance with reason and justice, that "when mortgaged lands are sold for arrears "of Government revenue, not accrued through "default of the mortgagee, any proceeds "which may arise from the sale in excess of "the arrears belong to the mortgagee, and he "has a right of action for their recovery."

It is clear in fact that the money, the proceeds of sale, which had been substituted for the lands mortgaged, became subject to the lien to which the land which it represents was subject.

For these reasons, it is clear to me that the plaintiff is entitled to sue the defendant Heera Lall Chowdhry, who by his proceedings in the Court of Small Causes has obtained out of the Collector's Court money to which he has no title until the mortgagee is satisfied.

The appeal is dismissed with costs.

Jackson, J.—I concur.

The 29th August 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Joint debt—Payment to one Member—Refusing a registered letter.

Case No. 86 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 24th January 1871.

Loolf Ali Meah and another (two of the Defendants) *Appellants,*

versus

Pearee Mohun Roy and another (Plaintiffs) and another (Defendant) *Respondents.*

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Baboos Kalee Mohun Dass and *Romesh Chunder Mitter* for Appellants.

Mr. J. T. Woodroffe and *Baboos Unnoda Pershad Banerjee, Hem Chunder Banerjee, Gobind Chunder Doss* and *Kalee Kishen Sen* for Respondents.

A person paying to one member of a partnership a debt jointly due to all the members, is bound to show that he is acting *bonâ fide* on the understanding that it is for the benefit of the partnership.

A person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents.

Ainslie, J.—We think that this appeal must be dismissed with costs. There is no dispute as to the material facts of the case. The only question is whether a payment made by the defendants to Bisokha Moyee, one of the three persons from whom they borrowed a sum of money under a registered bond, was a good and sufficient payment of the whole debt. One of the plaintiffs, Huree Mohun, swears to having sent a registered letter to the defendant with notice not to pay to Bisokha Moyee, but either to pay to them on security or deposit the money with some third party. This letter, it appears, was refused by the addressee and came back to the hands of the sender, and has now been produced in Court. It is somewhat singular that immediately after this letter, that is, on the 7th Poos, the defendant alleges that he gave notice to the plaintiffs to receive payment and give up the bond. Subsequently, a payment was made to Bisokha Moyee, and in her written statement she states that 500 rupees was remitted by her and that she received the remainder. Whether this was so or not we do not know, because the defendant has not brought forward the bond which he admits is in his hands to show how it is endorsed, nor does he produce any separate receipt from Bisokha Moyee, and we do not know on what terms she made the bond over to him. The Court below has found that the defendant was not justified in paying the whole of the money back to Bisokha Moyee, citing as authority a passage in Macpherson on Contracts, page 84, which is to the effect that if a person borrows money from two parties jointly, he must re-pay it to both jointly.

The defendant in appeal has contended, firstly, that the suit is wrongly brought, as Bisokha Moyee was not joined as a plaintiff. This appears to us to resolve itself into a matter of form which in no way affects the merits, inasmuch as Bisokha Moyee has been brought into Court and the facts are not disputed in any way; and secondly, that the payment was a good payment to one member of a partnership. We think that to establish this plea it is necessary to show that the payment was *bonâ fide* made on the understanding that it was for the benefit of the partnership, but we altogether fail to see that this was the case here. It may be perfectly true that the defendant did not see the contents of the letter of the 13th Aghrain 1276; but if so, his ignorance of it was entirely the consequence of his own act. That letter was forwarded to him by post duly registered, and we must presume that it was tendered to him. He, therefore, cannot take advantage of his refusal to take it.

But independently of this, we think that when a person pays to a Hindoo female the whole of a debt due jointly to her and to two others, he is bound to show that he was acting *bonâ fide*; and if he had been doing so, he would undoubtedly have produced the bond, and would have proved the actual payment of the whole sum to Bisokha Moyee, and that it was offered to and accepted by her as a payment to the partners jointly. But defendant entirely failed to do any thing like this.

It appears to us, therefore, that this appeal must be dismissed. Separate costs will be given to the plaintiff and to Bisokha Moyee who has been made a respondent.

The 31st August 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Cross claims—Bonds—Rent.

Case No. 104 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 16th February 1871.

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Messrs. R. Watson and Co. (Defendants) *Appellants*,

versus

Maharanee Brojo Soonduree Debia (Plaintiff) *Respondent*.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondent.

A liquidated sum due on a bond is capable according to law, even without an agreement to that effect, of being set off against sums due for rent.

Norman, C. J.—THIS is a suit by Maharanee Brojo Soonduree Debia, the widow of Maharajah Gobind Nath Roy Bahadoor of Nattore in Rajshahye, against Messrs. Robert Watson and Co. for arrears of rent amounting to rupees 11,699-6-10.

Subject to a question to which we shall presently come, Messrs. Watson & Co. paid this rent except rupees 341-3-4 which they brought into Court.

The questions which were in dispute relate first to a sum paid by Messrs. Robert Watson & Co. for Government revenue which with interest amounts to Rs. 4,919-6-6. This sum the Subordinate Judge, Baboo Gopeenath Bose, allowed to Messrs. Robert Watson & Co., it having been proved that it was paid by the authority of Rajah Gobind Nath Roy by the defendants on behalf of the Rajah into the Collectorate.

The second item is a sum of rupees 4,000 which the defendants claim to be due from the late Rajah Gobind Nath Roy under a bond, dated the 5th Bysack 1273, which was registered on the very day on which it was executed.

It was registered on behalf of the Rajah by Ram Kishen Roy, his Dewan. Ram Kishen Roy is dead, and the Rajah is dead, and therefore they of course could not be called as witnesses by the defendants. The defendants did, however, call as a witness a servant of the Ranee who proved that the seal and signature on the bond resembled, in fact "coincided" with the seal and signature of Rajah Gobind Nath Roy, but says the Subordinate Judge, "his evidence does ot establish the genuineness of the bond."

If it did not establish the genuineness of the bond, let us see what it amounts to. Either that the Dewan Ram Kishen Roy or Messrs. Robert Watson & Co. must have forged the bond, and must have registered it on the day on which it was forged. The plaintiff calls in question the genuineness of the bond, and the Subordinate Judge for some reason or another considers it insufficiently proved. The present Dewan of the Ranee was summoned as a witness by the defendants; but although he was summoned, and although his property was attached, he did not come into Court, and there is not a particle of evidence to show that the bond was not genuine, that the transaction was not entered in the Rajah's books, or that the money did not find its way into the Rajah's hands.

But the case does not stop there. The defendants called a servant of theirs named Subanund Bagchee, who proved that the Dewan Ram Kishen Roy came to and took from Messrs. Watson & Co., prior to the execution of the bond, on two different dates the sum of rupees 2,000 under two *howlatee rokahs* written in his own name; and afterwards when the bond was signed and sealed by the Rajah, he returned the rokahs and took the remaining rupees 2,000; then the bond was registered.

If the execution of an obligation is not to be deemed sufficiently proved by evidence of this description, evidence that is most natural, the truth of which is not questioned, and which is quite uncontradicted, people of business could not conduct their affairs. We are of opinion that the bond is genuine.

It is said that the money was required for the purposes of the Rajah, and that there was a stipulation that the money covered by the bond was to be set off against the arrears of rent. But suppose that there was no such agreement, there is a liquidated sum due on the bond which according to law can be set off against sums due for rent, and it would be contrary to the principles of justice and equity if we allowed the Rajah to recover from Messrs. Robert Watson & Co. large sums of money, leaving Messrs. R. Watson & Co. to take their chance of recovering the sum due on the cross-claim by a separate suit.

For these reasons, we reverse the decision of the Lower Court and dismiss the plaintiff's suit with all costs.

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The 1st September 1871.

Present:

Tha Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Application to set aside ex parte decree—Section 21 Act XI. 1865.

Reference to the High Court by the Judge of the Small Cause Court at Jessore.

Shojouee Dossia, *Plaintiff*,

versus

Dhuronee Dhur Ghose and another, *Defendants*.

An application presented to a Small Cause Court on the 25th May to set aside an *ex parte* decree obtained on the 14th March, when no process had been executed for enforcing the decree, was held to fall within the first of the two provisions in Section 21 Act XI of 1865.

Case.—THIS is an application presented to this Court by defendants on the 25th May last to set aside the *ex parte* decree obtained against them by plaintiff on the 14th of March last; but as no process has been executed for enforcing the decree, the question arises whether it ought to be admitted or rejected.

I think the question turns entirely on the construction of Section 21 of Act XI of 1865, which enacts:—"In suits tried under the Act all decisions and orders of the Court shall be final" subject to two provisions: first, it is provided "that in any case in "which a decree shall be passed *ex parte* "against a defendant he may, within thirty "days after any process for enforcing the de-"cree has been executed, give notice to the "Court by which the decree was passed, of "his intention to apply to the Court at its "next sitting for an order to set it aside," and so on. Secondly, "that it shall be "competent to the Court if it shall think fit "in any case not falling within the proviso "last aforesaid" (that is, in any case not decided *ex parte*) "to grant a new trial if "notice of the intention to apply for the "same at the next sitting of the Court be "given to the Court within the period of "seven days from the date of the decision," and so on.

Now the wording of this Section does not, I think, enable a defendant to come in at any time to set aside an *ex parte* decree, but it makes it incumbent on him to wait till some process for enforcing the decree has been executed, and then it directs him to come in within thirty days from that time; and in this respect the practice in the Mofussil Small Cause Courts differs from the Calcutta Small Cause Court, inasmuch as in the latter Court a defendant may, *at any time* subsequent to the judgment given in his absence, apply for a new trial in setting aside the proceedings, provided that the application be made within four days from the day on which he deposited the debt and costs in Court. See Section 43 of Act IX of 1850, and Rule 20 in Temple's Practice.

It has been argued that if Section 21 will not help the applicants, I should turn to the provisions of Act VIII of 1859 on the subject, as by Section 47 of Act XI of 1865 it enacts,—"that except as hereinbefore pro-"vided the provisions of the Code of Civil "Procedure shall so far as the same are or "may be applicable extend to all suits and "proceedings under this Act;" but granting for arguments sake that the provisions of Act VIII will apply, I think the applicants are met by a similar objection as in Sections 21, for Section 119 of Act VIII of 1859 enacts:—"But in all cases in which "judgment may be passed *ex parte* against "a defendant, he may apply within a rea-"sonable time, not exceeding thirty days, "after any process for enforcing the judg-"ment has been executed, to the Court by "which the judgment was passed for an or-"der to set it aside," and so on. So that in any view of the case, the present application appears to me to be premature and ought to be rejected, but as I have doubts in the matter, I shall reject the application contingent on the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—The case does not state any fact which would lead us to infer that the applicant has not brought himself within the first of the two provisions referred to by the Judge. It appears to us that the application ought not to have been rejected.

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The 1st September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Section 29 Act VI of 1871—Jurisdiction—Pending suits.

Reference to the High Court by the Sudder Moonsiff of Purneah, dated the 27th June 1871.

Ghotae Mundul, *Plaintiff*,

versus

Kajroo, *Defendant*.

The investiture of a Moonsiff with the powers of a Small Cause Court under Section 29 Act VI of 1871, does not deprive parties to pending suits of any right of appeal which they might have had; the general rule being that the law as it existed when the action commenced must decide the rights of the parties, unless the legislative authority expresses a clear intention to vary those rights.

Case.—GHOTAE Mundul brought a suit against Kajroo claiming rupees 9-6 damages on account of short crops. He had given some lands to Kajroo to cultivate for him. The crops were to be equally divided, but as Kajroo had cultivated the lands late in the season, the land did not yield so much as plaintiff has expected. Hence the suit, which was instituted after I was vested by the Local Government with powers of a Small Cause Court Judge. In this case my order is final.

Kajroo had instituted a suit before my being vested with the above-mentioned powers. That suit also relates to these very lands. He claims rupees 39-6 price of paddy, &c., said to have been removed by the plaintiff Ghotae, without giving him his half share. Kajroo prays that both the cases be heard together. In this case my order is appealable.

Under the circumstances stated above, can the cases be tried together purely as Small Cause Court cases, one having been instituted after the trying officer's having been vested by the Local Government with powers of a Small Cause Court Judge, and another before it.

I hold the affirmative of this question.

The judgment of the High Court was delivered as follows by

Norman, C. J.—When Kajroo instituted his suit before the Moonsiff for rupees 39-6, he brought the suit to which a right of appeal was incident. We think that the subsequent investiture of the Moonsiff with the powers of a Small Cause Court Judge under the provisions of Section 29 of Act VI of 1871, the Bengal Civil Court's Act, did not affect pending suits so as to take away any right of appeal which the parties to such suits might have had, the general rule being that when the law is altered pending an action, the law as it existed when the action commenced must decide the rights of the parties in the suit, unless the legislative authority expresses a clear intention to vary the rights of the parties to each other. In Moon *versus* Durden, 2 Exch., 22, the doctrine of which has been accepted by the Judicial Committee of the Privy Council in Pitambur Doss *versus* Thakoor Doss Doss, 7 Moore's Privy Council Cases, 239, Lord Cranworth says that "the principle "that a legislative enactment ought to be "prospective and not retrospective in its "operation is one of such obvious convenience and justice that it must always be "adhered to in the construction of statutes, "unless in cases where there is something "on the face of the enactment putting it "beyond doubt that the legislature meant it "to operate retrospectively."

The case of Kajroo must, therefore, be tried as an ordinary suit in the Moonsiff's Court.

The 1st September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Small Cause Courts—Local Jurisdiction—Execution—Sections 285 and 286, Code of Civil Procedure.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 10th July 1871.

Kodoo Mundul (Plaintiff) *Decree-holder*,

versus

Shushee Shikhur Sircar and others (Defendants) *Judgment-debtors*.

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A Small Cause Court in which a decree is passed is competent to entertain an application for its execution, even if the debtor's residence and moveable property are situate in a place which has since the decree been excluded from that Court's jurisdiction.

In such execution the course to be pursued is that prescribed by Sections 285 and 286, Code of Civil Procedure.

Case.—THE decree-holder filed application for execution on the 22nd May last, praying for the attachment of the debtor's moveable property situate in Thannah Commercolly, which has been excluded from the jurisdiction of this Court, and included in that of the Small Cause Court of Kooshtea in the District of Nuddea from 1st May last, under Government Notification published at page 1110 of the *Calcutta Gazette* of the present year. The decree-holder's pleader argues that as the decree was passed by this Court before 1st May last, it must be executed here under provisions of Section 207 of the Procedure Code by attachment and sale of the property alluded to.

Issues.

1*st.*—In what Court will the decrees passed by this Court before 1st May 1871 in connection with Thannah Commercolly be executed ?

2*nd.*—If application for execution of such decrees be received in this Court, what course will be followed for attachment and sale of the moveable property situate beyond its territorial jurisdiction ?

I consider that as this Court which passed the decree is in existence, it can receive application for execution under Section 207 of the Civil Procedure Code, the fact that the debtor's place of abode has been transferred to the jurisdiction of a different Court being immaterial. In accordance with the laws in force, a decree must be executed by the Court which passed it. Though Commercolly is not now included in the jurisdiction of this Court, yet it is right and proper to file application for execution here in the first instance.

The moveable property of which attachment has been prayed for, is situate at a place which, though it was within the jurisdiction of this Court at the date of decree, has now been transferred to a different district. This Court, therefore, though it can receive application for execution, as shewn above, is not empowered to attach the said property under the Honorable High Court's Ruling in letter No. 2225 of 7th July 1865, published at page 136 of the Small Cause Court Ruling book. I am of opinion that in cases of this nature, Sections 284, 285 and 286 of the Procedure Code ought to be followed, and copy of decree and certificate ought to be sent in the manner laid down in the precedent, dated 29th January 1868, published in Wyman's Reporter, page 29, Small Cause Court Reference, Volume V.* But as I have doubts on this point and there are no precedents to throw light on it, I respectfully refer it for the opinion of the Honorable Judges of the High Court under provisions of Section 1 Act X of 1867. The execution of the decree shall be stayed until the receipt of the order of the High Court on this reference.

The judgment of the High Court was delivered as follows by

Norman, C. J.—The Court in which the decree was passed is still competent to entertain an application for its execution.

The decree may be executed at any place within the jurisdiction of such Court. If it be desired to execute the decree against property out of the present jurisdiction of the Small Cause Court at Pubna, the course prescribed by Sections 285 and 286 must be pursued.

The 1st September 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Bond suit—Farming lease—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 19*th June* 1871.

Nobin Chunder Vodro and others, *Plaintiffs,*

versus

Kedar Nath Chuckerbutty, *Defendant.*

Case.—Plaintiffs having obtained a sum from defendants on a bond, let certain land to them in ijarah for a term of years on condition that the latter after realizing

* 9 W. R., p, 175.

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rents from the ryots would give credit on account of interest on the said bond, pay rent due to plaintiffs' landlord, and pay the balance to plaintiffs. Having failed in the engagements defendants were sued in the Small Cause Court.

HELD that the suit was a suit on a contract and could not have been brought any where else than in the Small Cause Court.

Case.—THIS is a suit brought by the plaintiff to recover from the defendant rupees 75-11 under the circumstances stated in the plaint, which runs as follows :—

"Suit for the recovery of rupees 75-11 "as refund of rent realized under a *Barat*. "In village Komurchanda of Pergunnah "Moolghur, we hold an ancestral gati "jummah and a rent-free tenure extending "over 165 beegahs 10 cottahs of land, "which we, on obtaining rupees 200 on a "bond on the 22nd Pous 1275, let in tjarah "to defendants on that date for 9 years "commencing from 1276 to 1284, and the "sum of rupees 71-12 which was due to "us by the undermentioned ryots for rent "of the said year 1275 was given in *Barat* "to defendants on the said 22nd Pous on "this condition—that the defendant after "realizing the amount from the ryots shall "give credit of rupees 16 on account of "interest on the said bond, and out of the "balance shall pay rupees 39-8 to the "malik as rent due to him and shall make "over the receipt to us on obtaining the "same from him, and shall also pay the "remaining rupees 16-4 to us in cash and "shall take from us a receipt for the whole "amount ; and should he fail to act up to "the condition, he shall pay the amount "with interest at the rate of ½ anna per "rupee per month. The ryots were duly "confronted about the *Barat*, and the defen-"dant has accordingly realized rent from "the ryots, but he has not paid us the "amount according to the terms and taken "receipt from us, and as the malik has "realized the rent from us with costs and "interest by suing and obtaining decree "against us, we are entitled to recover the "same from the defendant as per account "set at foot, through strength of proof."

The defendant denies that he has collected the rents as alleged in the plaint, and urges that this suit is not maintainable in a Small Cause Court but in the Civil Courts under the provisions of Act VIII of 1869, which had been extended to this district under Notification (see the *Gazette*) of March 2nd, 1870.

Now, Section 30 of Act VIII of 1869 says that "suits for the recovery of money "in the hands of an agent or for the deli-"very of accounts or papers by an agent "may be brought at any time during the "agency or within one year after the de-"termination of the agency of such agent," and so on ; and Section 104 excludes the jurisdiction of Small Cause Courts, so that the jurisdiction turns entirely on the construction to be put on the word "agent" in the Section referred to.

It may be observed that Section 30 is a transcript of Section 33 of Act X of 1859, and Section 249 of that enactment explained who agents were. It said "suits by zemin-"dars and others in receipt of the rent of "the land against any agents employed by "them in the management of land or col-"lection of rents or the sureties of such "agents for money received or accounts kept "by such agents in the course of such em-"ployment or for papers in their possession, "shall be cognizable by the Collectors," and so on. So that there could be no doubt that the agents referred to in Section 24 "were "employed by land-holders in the manage-"ment of land or collection of rents," but this Section which defined the meaning of the word "agent" has been omitted from the present Act, and it is therefore difficult to say what construction the High Court may put upon the word "agent."

Assuming, then, that suits under Section 30 are "suits by zemindars and others in receipt of the rent of lands against agents employed by them in the management of land or collection of rents," it remains to be seen whether the defendant falls within the definition of agent in the Section referred to ; and I think there is not much room left for doubt on this point as an agent is a person authorized to do some act or acts in the name of another, and the authority confided to an agent may be one or other of three kinds, *viz.*, special, general, or universal ; and as the defendant was possessed of limited authority as appears by the plaint, he would come under the first head, or what one would call a special agent. Consequently, as it is alleged he has collected rents from the ryots of plaintiffs and misappropriated it, I think he would clearly be liable to a suit under Section 30 for the recovery of the money in his hands, and that therefore the jurisdiction of a Small Cause Court is barred by Section 104.

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For the above reasons I have not entered into the merits of the suit, but as I have doubts in the matter I beg to solicit the opinion of the High Court on the point whether the suit as laid is cognizable by a Small Cause Court.

The judgment of the High Court was delivered as follows by

Norman, C. J.—This is a very simple case. It is a suit on a contract by which the defendants, for certain consideration therein mentioned, agreed to give to the plaintiffs credit against the interest due on bond rupees 16—to pay them in cash rupees 16-8, —and to pay to their landlords rupees 89 8. Having failed in the engagement, the defendants are sued and rightly sued in the Small Cause Court, and could not have been sued any where else.

The 1st September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Institution of Plaints on holidays.

Reference to the High Court by the Officiating Subordinate Judge of Midnapore, dated the 12th June 1871.

Ununto Ram Chatterjee (Defendant) *Appellant,*

versus

Protab Chunder Shiromonee (Plaintiff) *Respondent.*

No one for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

A plaint may be received and admitted by a Moonsiff on a Sunday or other holiday.

Case.—THE plaintiff, respondent, sued to recover rupees 160, being principal and interest due on a bond, dated 15th Joist 1273.* The time for re-payment of the debt was fixed for the month of Kartic 1275. The plaint was presented to and received by the Moonsiff on the 29th Kartic 1278, corresponding with the 16th November 1870. This was a Sunday, and the two following days were authorised holidays on account of the Hindoo festival Kartic Poojah, and it is therefore contended on the part of the defendant, appellant, that the filing of the plaint on a Sunday was illegal; that it must be considered to have been filed on the date the Court re-opened after the holidays; and that the time for the institution of the suit having expired on a holiday, the suit was barred by limitation under Act XIV of 1859. Vide Full Bench Ruling, dated 14th June 1865, in the case of Rajkisto Roy *versus* Dina Bundhoo Sarmah, defendant, reference from Small Cause Court, Hooghly.

* Pergunatee year.

I have been much pressed on the part of the appellant to solicit the Honorable Court's decision on the following point:—

It seems to me that according to the agreement the debt was payable at any time within the month, that is, up to the 30th day (the month being 30 days) of Kartic 1275, corresponding with the 14th November 1867, and as the debt was not paid within the time stipulated, the plaintiff's cause of action accrued on the following day *i. e.*, on and from the 1st Aughran 1275, corresponding with the 15th November 1867. Under Clause 9, Section 1, Act XIV of 1859, such suits are to be brought within three years from the time when the debt became due, and the plaint being received by the Moonsiff the suit must be considered as duly presented in time so as to bar the operation of the law of limitation. Act XIV of 1859 makes no exception of Sundays or other holidays as *dies non*. The Circular Order of the High Court,* dated 18th December 1869, authorised the doing of an act for which emergent applications may be made and which may be lawfully made or done out of Court.

The Sudder Court, North-Western Provinces, have ruled that if a plaint is filed on a holiday it is to be considered as filed on the day the Court re-opens after the holidays, Vide Broughton, 4th Edition, page 72; but the Act (XIV of 1859) is altogether silent on such a point and gives no discretion to the Courts to extend the time of limitation. The Court was closed on account of Sunday, so the plaintiff could not present his plaint in Court on that day.

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* 12 W. R., Civ. Cirs., 14.

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It is urged that Sunday is reckoned as *dies non*; but as the time for bringing an action had to expire on the 30th Kartic 1275 and that day was a close holiday, the plaintiff was justified, I should think, in presenting his plaint to the Moonsiff on Sunday, the 29th Kartic 1275, and there was nothing illegal in receiving it on that day.

The rulings cited in the margin,* referred to by the pleaders on both sides are not, I think, at variance with my opinion; so I dismissed the appeal contingent upon the decision of the Honorable Court.

*XI Weekly Reporter, p. 388, Rulings in Small Cause Court References, by Sutherland, and III Weekly Reporter, Small Cause Court References, page 6.

The judgment of the High Court was delivered as follows by

Norman, C. J.—We think there is no reason why a plaint should not be received and admitted by a Moonsiff on a Sunday or other holiday.

The appeal has been rightly dismissed by the Subordinate Judge.

The respondent will get the costs of the case, and we allow 16 rupees as pleader's fee.

The 4th September 1871.

Present:

The Hon'ble J. R. Norman, *Officiating Chief Justice*, and the Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

Regulation X of 1793—Minor's right of action—Guardian—Manager—Section 3 Act XL of 1858—Sections 376 and 377, Civil Procedure Code.

*Application for Review of Judgment passed by the Hon'ble Justices H. T. Raikes and W. S. Seton-Karr, on the 22nd March 1864, in Regular Appeal No. 408 of 1863.**

Modhoo Soodun Singh, Surbarakar on the part of Rajah Prithee Nath Singh, minor, Plaintiff (Appellant) *Petitioner*,

versus

Rajah Prithee Bullub Paul and others, Defendants (Respondents) *Opposite Party*.

* W. R., Gap Number, *Civil*, p. 140.

Mr. J. W. B. Money for Petitioner.

No one for Opposite Party.

Where the trusts of manager and guardian are vested in different persons, an action instituted on behalf of the minor with the sanction of the Court of Wards is properly brought by the manager.

In a case in which Regulation X of 1793 has no application, the Court may, under Section 3, Act XL of 1858, allow a friend or relative of the minor to institute a suit on his behalf, and where the guardian omits to take steps for the protection of the infant the Court may allow another person to sue for the benefit of the latter.

An infant is as much bound by a judgment in his own action as if of full age, and if an application for review is made on his behalf it must be subject to the conditions of the 376th and 377th Sections of the Code of Civil Procedure.

Norman. C. J.—This is an application on behalf of Rajah Prithee Nath Singh, zemindar of Perguinnah Nyagram, for a review of a decree of this Court passed in pursuance of a judgment of Mr. Justice Raikes and Mr. Justice Seton-Karr. The decree bears date the 22nd of March 1864.

The suit, instituted on the 31st of December 1861, was brought by Baboo Modhoo Soodun Singh, the manager of the estate of Rajah Prithee Nath Singh, then an infant under the Court of Wards to recover 345 beegahs 5 cottahs of land in Mouzah Banegurriah.

He says that Mr. Reily, a Deputy Collector, examining certain puika lands, ordered the Ameen to take measurements and prepare a map, and on the 7th of July 1858 found the lands in question to be in possession of the defendants, the Puika of Anurtoorish; that this order having been confirmed in summary decisions by the Magistrate and Sessions Judge, the defendants dispossessed the minor by taking possession of the land in dispute. The plaint prayed that the Court would award possession to the minor by setting aside the order of the Deputy Collector. The defendants alleged that the plaintiff had never been in possession, and that under Act XIII of 1848 the suit was barred by limitation, not having been brought within three years from the Deputy Collector's award.

The Judge of Midnapore dismissed the suit on the ground of limitation, and his decision was affirmed on appeal by the decree of which a review is now sought.

It appears that the Rajah came of age at sometime prior to the 28th of May 1868,

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On that day he appears to have given a receipt for Government paper handed to him by the officer of the Court of Wards. The petition for review was filed on the 19th of May 1871.

It appears from the plaint that Narainee Dabee, the mother of the infant, was his guardian, and that the suit was not brought by her but by the manager appointed by the Court of Wards.

Mr. Money contended that the guardian not having been a party to the suit, the infant was not properly represented.

There is a complete answer to that objection. Under Regulation X of 1793, Section 7, "where the trusts of manager and guardian are vested in different persons the manager is to have the care of the estate, real and personal; the guardian the care of the person, maintenance and education of the minor." The 9th Section shews what are the duties of the manager. He is to engage to manage the estate diligently and faithfully for the proprietor and to use every means in his power to improve the same for his benefit, &c.

The action, which we must presume to have been sanctioned by the Court of Wards, was properly brought by the manager.

If this had been a case to which Regulation X of 1793 had no application, the Court might, under Act XL of 1858, Section 3, have allowed any friend or relative of the minor to institute a suit on his behalf. And in a case where the guardian omitted to take the necessary steps for the protection of the infant, as was suggested by the plaint in the present case, the Court might no doubt allow another person to sue for the benefit of the infant.

The point as to the extent to which an infant is bound by a decree passed against him while represented by a guardian has not been much considered by the Courts in this country. Certain principles have, however, been laid down by a course of decisions in England which seem consonant to equity and good conscience.

According to the law as administered in England, it is the general rule both at law and in equity that an infant is as much bound by a judgment in his own action as if of full age. See per Lord Hardwicke, in Gregory *versus* Molesworth, 3 Atkyns, 626. In Chambers on Infants, page 795, it is said:—

"An infant is as much bound by a decree in equity as a person of full age (with certain exceptions thereinafter mentioned) and therefore if there be an absolute decree made against an infant he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error."

In Macpherson on Infants, page 430, and Chambers on Infants, page 796, the cases are discussed in which it is open to an infant, on coming of age, to impeach a decree obtained against him in his infancy. See also Musleah *versus* Musleah, I Boulnois, 58.

We need not discuss the question whether Mr. Money's client is able to show any ground on which a review could be granted.

It is enough to say that if an application for review be made it must be subject to the provisions of the 376th and 377th Sections of the Code of Civil Procedure. If we suppose that infancy could be admitted as a reason for not making an application for review until the infant attains his full age, we have no explanation of the delay of nearly three years which has since taken place.

If an infant has a right to ask for a review of a decree passed against him, it is clear that he ought to come to the Court promptly on attaining his majority. But it has not been suggested that the petitioner had any excuse for not preferring the application within a reasonable time after coming of age.

We, therefore, reject the application.

The 5th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Infants—Decree by Consent—Procedure.

Case No. 468 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 9th January 1871, *affirming a decision of the Moonsiff of Madareepore, dated the 8th August* 1870.

Ram Churn Raha Bukshee (Plaintiff) *Appellant,*

versus

Mungul Sircar and others (Defendants) *Respondents.*

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Baboo Chunder Madhub Ghose for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A Court ought not to make a decree by consent against an infant, without ascertaining that it is for the benefit of the infant that such a decree should be pronounced.

Norman, C. J.—It is quite clear that this special appeal is not well founded.

The plaintiff sues as owner of a talook for possession of a jote within that talook which belonged to one Shaban. He says that after the death of Shaban, the jote came to Meajan; that Meajan remained in possession till 1274, when he made default and absconded. The plaintiff says that in 1275, the Sircar defendants came into possession as trespassers and he was unlawfully dispossessed.

Mungul Sircar and others, defendants, said that they had nothing to do with the land. One of the defendants, Kullye Sircar, alleged that the person in possession of the jote was the guardian of Meajan, who was a minor, a person named Assâlat Khan; that the jote was an ancestral jote belonging to the minor, and he himself had been put into possession on behalf of the minor upon the understanding that he was to pay one-half of the profits to the minor. Upon this, Assâlat Khan was made a defendant. The suit was dismissed by the first Court.

From that decision, there was an appeal to the Subordinate Judge of Backergunge, Moulvie Eradut Ali. On this appeal, Assâlat Khan came in and put in a petition saying that he was not willing to defend the appeal, that the jote was not profitable to the minor, and that he was prepared to resign it on the part of the minor.

The Subordinate Judge being somewhat surprised at such a proceeding, made enquiry, and came to the conclusion that the petition was fraudulent, that Assâlat Khan ought not to have filed it, and it was likely to be prejudicial to the interests of the minor. He, therefore, affirmed the judgment of the first Court, and from that decision of the Subordinate Judge this special appeal has been presented.

It is a rule adopted by Courts of Equity in England and in the Original side of this Court, a rule which has been acted upon on many occasions within my own knowledge on this side of the Court, that where infants are concerned the Court will not make a decree by consent against an infant without ascertaining that it is for the benefit of the infant that such a decree should be pronounced; and we think that this is only a proper protection to the infant, because if the decree is once pronounced it becomes binding upon the infant, and he is not competent to dispute it unless he can show that the decree was obtained by fraud. This would throw the burden of proof on the infant and would place many difficulties in his way.

The Subordinate Judge has only done his duty, and after making proper enquiry has come to the conclusion that he ought not to make a decree against the infant founded upon the consent contained in Assâlat Khan's petition.

The appeal is dismissed with costs.

The 5th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Section 153 Act X of 1859—Appeal—Right of action—Equitable title to rent.

Case No. 498 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 2nd February 1871, *affirming a decision of the Deputy Collector of Ranaghat dated the 30th July* 1870.

Eshan Chunder Ghossal (Defendant) *Appellant*,

versus

Burno Moyee Dossee (Plaintiff) *Respondent*.

Baboo Umurendro Nath Chatterjee for Appellant.

Baboos Grija Sunkur Mojoomdar and *Bhyrub Chunder Banerjee* for Respondent.

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No appeal is given by Section 153 Act X of 1859 in a case in which a landlord sues a person as tenant who repudiates the tenancy without denying the landlord's title.

An action for rent does not lie against a person said or shewn to be in possession of a tenure which is written in the books of the zemindar in the name of a different person, unless there is a contract for rent, express or implied.

Norman, C. J.—One Ram Kanaye Mitter was formerly the ijaradar of Palitparah. He also possessed a jote called Shahasaram within that ijarah. This jote was conveyed by him by a bill of sale to Mohendro Nath Banerjee in the year 1275. The ijarah of Ram Kanaye afterwards came to the hands of the present plaintiff, who sues one Eshan Chunder Ghossal for the rent of Shahasaram from Srabun 1275 to Magh 1275.

The plaint, by way of stating the right of the plaintiff to maintain the action, simply says that a jote in the name of Shahasaram is written within that ijarah and Eshan Chunder Ghossal is in possession of that jote. The plaintiff rests his claim to sue Eshan Chunder for rent on the ground that the transfer by Ram Kanaye Mitter to Mohendro Nath Banerjee was really a transfer to Eshan Chunder Ghossal, and that Mohendro Nath has been holding since 1275 benamee for Eshan Chunder Ghossal.

Eshan Chunder Ghossal denies this. He says that he had nothing to do with the jote; that he was never in possession of it; that he never paid any rent to the plaintiff, and that the suit will not lie in the Collector's Court.

The Deputy Collector, Ram Sunkur Sein, found that the defendant Eshan Chunder Ghossal was in possession of the jote, and he says "so he is liable for the rent."

From that decree, there was an appeal to the Judge, Mr. Pepper, who goes at great length through the evidence and comes to the conclusion on the facts that the supposed transfer to Mohendro Nath Banerjee in 1275 by Ram Kanaye, who is the nephew of Eshan Chunder Ghossal, was a mere benamee transaction, Ram Kanaye continuing to hold the jote but using the name of Mohendro Nath Banerjee to defeat his creditors, and that Ram Kanaye continued to pay rent himself up to the last payment before suit. The Judge goes on to say:—"I am also of opinion that this suit being "simply one for rent, and the decision of "the lower Court not involving a disputed "title to land, but simply that Eshan Chun-"der is liable for the rent of this jote at "a rate below 100 rupees, the appeal did "not lie to this Court but to the Collector, "as it was a suit decided prior to the pass-"ing of Act VIII of 1859 or its coming "into force." He, therefore, dismisses the appeal, and upholds the judgment of the first Court.

From that decision there is an appeal to this Court, and two points have been taken.

The first is that an appeal does lie under Section 153 of Act X of 1859.

It was argued by Baboo Umarendro Nath Chatterjee that in this suit a question relating to title in land or some interest in land by parties having conflicting claims thereto has been determined by the judgment of the Deputy Collector, and therefore that the judgment of the Collector is open to appeal as provided in the 153rd Section.

On looking closely at the language of that Section, it does not appear that the present case falls within the terms of it. No question relating to any title to land or interest in land has been decided in this suit *as between any parties having conflicting claims thereto*. A question relating to title to the land has, it is true, been raised, and that question has been decided as between the landlord and alleged tenant Eshan Chunder Ghossal. It must be admitted that it makes a great difference whether the decision is between parties having conflicting claims, or between the landlord and a tenant who repudiates his tenancy. If the question relates to title in land as between adverse claimants, although the amount sued for may not exceed 100 rupees, the question involved may be of very considerable importance, whereas in the present case the question involved is little more than the amount of the particular rent, because if Eshan Chunder is dissatisfied he can relinquish his tenure and so get rid of further responsibility.

We think that in the case when a landlord sues a person as tenant who repudiates the tenancy, not denying the landlord's title, no appeal is given by Section 153 of Act X of 1859.

It was urged, secondly, that the suit itself was not maintainable under Act X of 1859, and that the plaint does not show any liability on the part of the defendant to pay

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rent. The mere fact that a tenure is written in the books of the zemindar in the name of a particular person, of which another person is shown to be in possession, is not enough to support an action for rent against the person said or shown to be in possession, without something more, something to show an express or implied contract to pay rent. In the present case, it is not shewn that Eshan Chunder Ghossal ever paid rent or agreed to pay rent to the landlord or attorned to him in any way. He is liable, if at all, for rent merely on the ground that as between himself and the nominal transferee of the tenure he is equitably entitled to possession, and equitably liable to indemnify that transferee for rent.

According to the decision of the Full Bench on this point,* an equitable title is not sufficient to give a right of suit under Act X of 1859. That being so, we are of opinion that the suit was not maintainable under Act X of 1859. We therefore set aside the decision of the Judge and dismiss the plaintiff's suit, but without prejudice to any question which may be litigated between the parties in the Civil Court.

Each party will pay his own costs of this appeal.

The 5th September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act VIII of 1869, Section 102—District Judge—Jurisdiction—Section 73 Act VIII of 1859—Appeals.

Case No. 402 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 20th February 1871, *reversing a decision of the Moonsiff of Gopalpore, dated the 23rd July* 1870.

Doyal Chunder Sahoy (Plaintiff) *Appellant,*

versus

Nobin Chunder Adhicarry (Defendant) *Respondent.*

* 6 W. R., Act X Rulings, p. 77.

Baboos Hem Chunder Banerjee and *Umerendro Nath Chatterjee* for Appellant.

Baboos Nil Madhub Sein and *Rash Beharee Ghose* for Respondent.

The words "District Judge" in Section 102 Act VIII of 1869 do not include any other Appellate authority to whom, under the provisions of the Civil Court's Act, appeals may be made over by the Judge; and when appeals are made over under Section 26 Act VI of 1871 to the Subordinate Judge, the latter does not dispose of them under the same condition in respect of finality as the District Judge.

Under Act VIII of 1869 the Civil Courts have powers higher than those which were vested in the Revenue Courts by Act X of 1859, but these powers need not be exercised so as to extend the relief asked for in a plaint.

A Court is bound to limit its inquiry to the issues which alone are necessary for the trial of the plaintiff's right to the relief sought, even when an intervenor appears and is made a defendant under Section 73 Act VIII of 1859, unless his intervention raises a new issue.

A party to a suit is competent to appeal to set aside the whole decree, and it is competent to the Appellate Court, on such appeal, to set aside the whole decree.

Ainslie, J.—In this suit, the plaintiff sued to recover a sum of rupees 34-2-3 pie from one Ram Dhun Mundul, alleging him to be a ryot on an estate purchased by the plaintiff at an auction sale on the 12th of Bhadon 1275. The defendant denied any liability to the plaintiff and alleged that he paid his rent to one Nobin Chunder Adhicarry, an intermediate holder under the former proprietors, and that he had paid the whole of the rent for the year 1275, the plaintiff claiming from Cheyt to the end of the year 1275. Nobin Chunder Adhicarry came in and was made a defendant under Section 73 of Act VIII of 1859. The first Court rejected the plea raised by the original defendant and by Nobin Chunder Adhicarry, and gave a decree to the plaintiff for a portion of the money claimed by him.

On appeal the Subordinate Judge, finding that Nobin Chunder Adhicarry had been holding, for some time previous to the purchase by the plaintiff, under the alleged mokurruree deed and continued so to hold up to the date of institution of the suit, reversed the judgment of the first Court and dismissed the suit, stating that so long as the plaintiff did not get the mokurruree right of Nobin Chunder set aside in a regular suit he is not entitled to receive rent direct from the tenants.

From this decision a special appeal has been filed. At the opening of the case an objection was taken by the respondent to the effect that no appeal will lie in this case,

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inasmuch as the whole sum claimed is under 100 rupees and no question of title has been determined by the judgment, and by Section 102 of Act VIII of 1869 the decision of the Court below is final. This objection, we think, must be over-ruled. In Section 102 the words are :—Nothing in this Act contained shall be held to confer any power of appeal in any suit tried and decided by a *District Judge* originally or in appeal, if the amount sued for or the value of the property claimed does not exceed 100 rupees, &c.

The words "District Judge" do not of necessity include any other appellate authority to whom, under the provisions of the Civil Court's Act then in force, Act XVI of 1868, or the present Civil Court's Act VI of 1871, appeals may be made over by the Judge. By Section 26, Act VI of 1871, the Judge is empowered to make over appeals to the Subordinate Judge who is also by that Section authorized to hear and dispose of them, but there is nothing in the Section which says that he shall dispose of them under the same condition in respect of finality as apply to the orders of a District Judge, and if we look at the further provisions of that Act we see from Section 28 that in miscellaneous cases which the Judge is empowered to make over to the Subordinate Judge for trial in the first instance, the appeal does not come direct to the High Court, but that there is an intermediate appeal to the District Judge, and in ordinary suits under rupees 5,000 there is an appeal on the merits from the Subordinate Judge to the District Judge ; so that it is quite clear that the Legislature considered the District Judge to be an authority of a higher grade than the Subordinate Judge, although the jurisdiction of the latter in original suits is, under Section 19, as wide as that of the District Judge, and we must presume that when Act VIII of 1869 was passed and the words "District Judge" were specifically inserted in Section 102, the Act constituting the several Civil Courts was in the contemplation of the Legislature.

Another answer to the objection was given to the effect that under Section 372 of Act VIII of 1859 a special appeal lies from all orders where it has not been specifically taken away and that as there is no provision specifically barring special appeal from the order of a Subordinate Judge in rent suits under rupees 100, it must be taken for granted that the right of appeal exists.

We think that this answer is also of great weight, and we find that in Special Appeal No. 247 of 1871,* decided by Justices Loch and Mitter on the 4th July 1871, it was held that Section 102 Act VIII (B. C.) of 1869 does not bar a special appeal from the order of a Subordinate Judge. On the whole, we are of opinion that the preliminary objection must be over-ruled.

On the case itself the questions that arise are—firstly, whether, in consequence of the repeal of Section 77 of Act X of 1859, the Civil Courts are bound to go fully into questions of title arising in rent cases brought before them or are at liberty to restrict themselves to such questions as the Revenue Courts were competent to try under that Section ; secondly, whether the present defendant Nobin Chunder Adhicarry was properly admitted as a party to the suit under Section 73 of Act VIII of 1859 ; and thirdly, whether the decision of the Subordinate Judge is not defective, inasmuch as he has omitted to notice material evidence on the record which has been relied upon by the first Court.

It was argued by Baboo Hem Chunder Banerjee that the effect of the repeal of Section 77 of Act X of 1859 is to make it incumbent on the Courts to try questions of title whenever such questions may arise in the course of rent suits and that they are not justified in restricting themselves to the points to which the attention of the Revenue Courts was limited by that Section. There can be no doubt that under Act VIII of 1869 the Civil Courts have powers higher by far than those which were vested in the Revenue Courts by Act X of 1859, and that *when properly called upon to do so* they will exercise these powers. We may refer to a case recently disposed of by the Chief Justice and myself, Regular Appeal No. 11 of 1871,† in which, in a suit brought under Act VIII of 1869, the Court carried its enquiry far beyond the points at which the Revenue Courts had been compelled to stop, but in that case there was *a special prayer for the relief granted by the Court.* This, it appears to us, is the distinction between that case and cases such as the one before us; and it does not at all follow that, because a Court has jurisdiction to entertain a suit for more ample relief than the plaintiff asks for in his plaint, it will therefore extend the relief actually asked for.

* *Ante, p.* 182.

† *Ante, p.* 61.

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The cases provided for in the Court Fees' Act do not go at all against this view of the case, because although in suits for mesne profits and accounts the Court can give a larger sum to the plaintiff than that which he may set out in his plaint as the amount of his claim, it will only do so on certain conditions, namely, that before executing his decree he shall pay into Court the full value of the stamp for a suit for the amount awarded, and so put himself in the same position as if, at the time of filing his plaint, he had included the full relief ultimately granted to him in his prayer.

In this suit the plaintiff prayed simply for a decree for certain specified arrears of rent. The defendant pleaded that he was not the tenant of the plaintiff. He did not deny that the plaintiff was the superior landlord, but alleged that he paid his rent to an intermediate tenant, and that the relation of landlord and tenant did not exist between the plaintiff and himself. On this certain issues arose, which were, *firstly*, whether the relation of landlord and tenant did exist between the plaintiff and defendant; and *secondly*, if the first were found affirmatively, whether any, and if any, what amount of rent was due by the defendant. It was not necessary for the Court to go beyond these issues, and the fact that the present defendant Nobin Chunder Adhicarry intervened alleging himself to be the intermediate holder and was made a defendant under Section 73 of Act VIII of 1859 did not necessarily introduce a new issue. Had it done so, the Court would have been bound to try it, but as the case stands the Court was not bound to try more than was necessary for the decision of the particular suit. In fact we would go further and say that the Court was bound to limit its enquiry to the issues which alone were necessary in order to try the plaintiff's right to the special relief that he sought. We do not think it can be contended that a person who is out of possession has the right to come to the Court and ask for a decree for rent with the view of bringing in a third party and having tried, under color of a rent-suit, all questions of title between himself and that third party. Such a proceeding is altogether opposed to the principle laid down in Section 7, Act VIII of 1859.

Suppose we take a case such as the following:—Two persons A and B purchase a property with their joint funds, but through the agency and in the name of A alone, B residing at the time in a distant part of the country or abroad; that during a certain number of years A receives the rents, gives leases, and makes all arrangements with the tenants; that he then without the knowledge of his co-sharer sells the property to a third person C, puts him in possession and announces to the ryots that C and C only is the party to whom they are to look as their landlord. Then suppose C to continue as the landlord receiving rents, suing the ryots, granting leases, making settlements, and otherwise dealing with the property as his own, for, say, five years or more, and that afterwards B returns and discovers what has been done. Is it to be said that he can at once proceed to sue a ryot for rent with a view to try in that suit the whole question of title between himself and C, and that it is not necessary for him first to get rid of the sale to C? It appears to us that in such a case and with such facts the proper issue to be tried is simply whether the relation of landlord and tenant exists between the plaintiff and the tenant, and that this must necessarily be found against the plaintiff and that such a suit can only end in being dismissed. If this were not so, where are we to draw the limit? Almost any question of title could be brought up in a rent suit, and we should next be asked to take up questions of accounts between mortgagor and mortgagee whenever a mortgagor might choose to sue a ryot for rent alleging that the mortgage had been paid off from the usufruct of the property.

Certain decisions were relied upon by the pleader for the appellant, but it appears to us that these decisions will not support his contention. The first one is a decision by Mr. Justice Macpherson, reported in Volume X, Weekly Reporter, page 52. In that suit, the plaintiff claimed to enter into possession of certain property by right of purchase from the owner Hameed Russool. The defendant made no substantial defence and the plaintiff established a good title to recover possession as against him. In this state of things, the mother of the defendant intervened and asserted that although the property stood in her son's name, she herself was the real owner. Mr. Justice Macpherson says:—"We think it much to be regretted that Banee Khanum was made a defendant in this way. Coming in as she does, her presence greatly complicated the case, and very unnecessarily. Having been admitted as a defendant she must remain there. But the fact of her having

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"caused herself to be introduced as a de-
"fendant must not change the onus of proof
"so far as she is concerned, and in our opi-
"nion the onus, as against the plaintiff, is
"entirely on her and not on the plaintiff,
"*since the latter has proved his purchase*
"*from Hameed Russool.*" It has been contended on the strength of this decision, that the onus was thrown entirely upon the intervenor in this suit to establish his title, and generally that the onus of proof is on an intervenor. This, however, is going beyond what that decision warrants. It was there distinctly pointed out that it was not because she was an intervenor that the onus was upon Banee Khanum, but because a *primâ facie* case had already been made out against the original defendant and ostensible owner of the property, and that therefore it was for her to make out a case sufficient to rebut that *primâ facie* case. The fact was that a new issue had arisen in the case in consequence of her intervention, and that the affirmative of this new issue rested upon her. But in the case we have to deal with, the intervention of Nobin Chunder does not necessarily raise any new issue, and it is sufficient for the purpose of this suit to determine whether the relation of landlord and tenant exists between the plaintiff and the ryot defendant.

The other case cited, that of Rajah Saheb Perladh Sein *versus* Doorga Pershad Tewaree, is to be found in Volume XII, Moore's Indian Appeals, page 331.* In that case, their Lordships observe that "the "appellant is the zemindar: as such he has "a *primâ facie* title to the gross collections "of all the mouzahs within his zemindaree. "It lay upon the respondents to defeat that "right by proving the grant of an interme-"diate tenure." That was a suit for ejectment, and there was no intervenor in the case, and there is further this important distinction that in that suit there was no attempt to alter or extend the relief which the plaintiff sought by his plaint; whereas in this suit there is a deliberate attempt by asking for one thing to get another very much larger. Then in that suit it was clearly necessary to determine the nature of the holding of the defendants, because the fact of their being at the time in adverse occupation was admitted, and the mere fact of such occupation did not affect the suit which was specifically brought to try the validity of the title under which the defendants held. But in the present case, the plaintiff has not asked us to try the quality of any intermediate tenure, and all we have to do on the plea of the defendant is to ascertain its existence.

Then as to the question under Section 73, it appears to us that it bears upon the case in this way: that if the intervenor was improperly made a defendant, it may be that the Subordinate Judge ought not, under the provisions of Section 337 of Act VIII of 1859, to have set aside the whole decree on his appeal. It is contended that as the intervenor alleges that he had actually received the rents for the period for which the plaintiff is claiming them, he cannot possibly be injured by any award to the plaintiff for that period, even if that award is a wrong one. It appears to us that this is taking too narrow a view of the provisions of Section 73, for it is quite clear that if such a decree as that of the first Court were to stand, and if that decree were wrong on the merits, the intervenor would be seriously injured. He would no longer be able to recover his rents from the ryots as hitherto. The ryots having been made to pay their rents twice over in one instance would assuredly not go on paying rent to the intervenor except under legal process, and if the intervenor is really in the position in which he alleges himself to be, he is entitled to be maintained in that position until ousted in due course of law, and it is for the plaintiff to proceed by a regular suit if he wishes to change the existing state of things. It seems to us that this view is in accordance with that taken by the Judges who disposed of the case reported in Volume XIII, Weekly Reporter, page 362. In our opinion, Nobin Chunder was properly admitted as a party to the suit, and being a party to the suit he was competent to appeal against the whole decree, and it was competent for the Subordinate Judge to set aside the whole decree on his appeal; and if the conclusion on the facts at which the Subordinate Judge has arrived is correct, it was no doubt right for him to make the order that he has made.

Then we come to the third ground, which is that the Subordinate Judge has not fully considered the evidence and the grounds on which the decision of the first Court rests. A decision of the 13th of May 1868 is put forward, in the 6th ground of appeal, as conclusively establishing the falsity of Nobin Chunder's claim, and it is said that the

* 12 W. R., P. C., p. 6.

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Subordinate Judge has wrongly overlooked this decision, although the Moonsiff strongly relied upon it. Now it is true that the Subordinate Judge has not alluded to this in his judgment, and it is possible, though not very probable, that he may have overlooked it; but if any body has suffered by the omission, it is the respondent and not the appellant, because the only thing this order proves is that the plaintiff purchased with notice of the respondent's claim, and the Moonsiff is wrong in saying that it was evidence against the respondent.

But there is another objection taken in the 4th ground of appeal to the effect that the Lower Appellate Court has entirely overlooked the authenticated copies of receipts filed by the special appellant, which go to show that the malika and not the alleged mokurureedars were in possession in the years 1271-72, and so far to contradict Ram Mundul's evidence. It appears from the Moonsiff's judgment that the defendant Ram Mundul was called upon to produce the original dakhilahs and that he did not do so. To introduce the copies, a vakeel of the Court, Baboo Bhurut Chunder Banerjee, was called, and he on examination stated that Ram Mundul took back from the Court the original dakhilahs which had been filed in another case; but we see that the Moonsiff has used the word "Istifsar" which ordinarily means an examination not on oath, and on looking to the record it appears that this was the nature of the examination. Now, without wishing to cast the slightest slur on the character of Baboo Bhurut Chunder Banerjee, we must observe that such an examination of a pleader called as a witness to prove a specific fact within his own knowledge, independently of anything that may have taken place in the suit, as to which he might be questioned as representing his client (supposing him to have been engaged in this suit) cannot be accepted as of any weight whatever; but it appears that these dakhilahs were put in in another suit by the brother of Ram Mundul, and the defendant Ram Mundul in the course of his examination in this suit has admitted that he and his brother were living in commensality and were holding the lands to which these dakhilahs refer in common at the time when that suit, which is described by the Moonsiff as a claim case, was instituted, so that they were certainly used in support of the defendant's interests by one who represented him in the then pending proceedings. This being so, there appears to be sufficient to connect the copies which have been filed with the defendant in this case. Then, we think, that it was rightly argued that if they are admissible against the defendant Ram Mundul, they must be taken, under the authority of the case in Volume X, Weekly Reporter above quoted, as evidence against the intervenor who was not bound to come in and expose himself to be in any way prejudiced by the evidence which had been put on the record as against the original defendant, but who, having so come in and made common cause with Ram Mundul, could not object that what was good evidence before his intervention was no evidence against him. What, however, the effect of these receipts is to be we are not at present prepared to say. It has been suggested by respondent's pleader that in the claim case above alluded to they were rejected as not genuine. This is a matter which will have to be considered hereafter. It is clear that whatever their proper effect is, the Moonsiff has relied very strongly upon them, and if they cannot be set aside as inadmissible they are undoubtedly evidence which it was necessary for the Subordinate Judge to dispose of before reversing the decree of the Moonsiff. We are therefore of opinion that the case will have to go back to be re-considered by the Subordinate Judge. As it has become necessary for us to remand it, we desire to call the attention of the Subordinate Judge to other points in the Moonsiff's decision that he should consider and specifically dispose of, and also to a point which has been noticed by my learned colleague Mr. Justice Kemp, which appears not to be referred to in the Moonsiff's decision. The Subordinate Judge will have to consider whether the other proceedings alluded to by the Moonsiff, namely, the other leases taken in the names of members of the intervenor's family for different portions of the property sold in execution of decree, do or do not indicate a want of good faith. He will also consider the very small amount of bonus, namely, 25 rupees, that was paid for the mokururee lease in this case, and the small jumma of 51 rupees on the large area of 525 beegahs of brohmuttur land. The Subordinate Judge should likewise consider a point which has been raised in the second ground of special appeal, namely, whether it has been shewn that Lushkurbond was a separate debuttur mouzah and whether Nobin Chunder Adhicarry was in possession of it as such separate debuttur mouzah.

It is not necessary that the Subordinate Judge should make any express declaration

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as to the validity of the title of the intervenor, if he finds the existence of the intermediate tenure ; but it is necessary that he should consider all the circumstances which are adduced to show that the alleged intermediate tenure was only set up at the last moment as a devise to defeat the auction purchaser, the real enjoyment of the property remaining unchanged, before he declares the existence of that tenure.

It may be that Nobin Chunder finding the Mitters in a strait induced them to give him a lease on terms which they otherwise would never have listened to, and that he entered into the transaction as a speculation the profit or loss of which was to concern himself only. In such case, his lease, if voidable, is at any rate for the purposes of this suit a good lease. But if Nobin Chunder's interest existed merely on paper, as alleged by plaintiff, and if it is established that the former owners continued to enjoy the rents and profits under color of his name up to the date of the auction sale, the plaintiff will be entitled to the decree he obtained in the first Court.

We therefore think that this suit must be remanded.

Costs to follow the result.

The 5th September 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Abetment of tort—Decree-holder—Damages—Section 191, Code of Civil Procedure—Delivery of moveable property—Jurisdiction—Dwelling-place — Criminal Courts — Possessory and proprietary rights.

Case No. 183 of 1871.

Regular Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 12th November 1870.

Kashee Nath Kooer (one of the Defendants) *Appellant,*

versus

Deb Kristo Ramanooj Doss (Plaintiff) and others (Defendants) *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Mr. J. S. Rochfort and *Baboo Ashootosh Dhur* for Respondents.

In actions of wrong those who abet the tortious acts are equally liable with those who commit the wrong.

Regard being had to the constitution of the Courts of this country, which are Courts of justice equity and good conscience, a decree-holder should be reimbursed damages for the time during which he is kept out of possession by the wrongful act of another party, whether his claim for subsequent damages be made in the execution of the first decree or in a regular suit.

Where a decree is for the delivery of moveable property and states the amount to be paid as an alternative if delivery cannot be had, the goods must be delivered if capable of delivery, but if not capable of delivery then assessed damages should be paid.

Courts having jurisdiction over the subject matter of a suit in which a right is asserted, have also jurisdiction over a supplemental suit in which the plaintiff seeks to follow out that right.

Whatever the purpose for which a man may go to another jurisdiction than that in which his family resides, if there is an *animus revertendi* the family dwelling house must be considered to be his dwelling place.

In a simple question of possession all that a Criminal Court can dispose of is the possessory right, not the proprietary title.

Paul, J.—THE facts connected with this case are as follows :—

The two defendants Kuroona Doss and Ramjee Doss, who were the owners of two boats, on the 23rd February 1866 sold one-third in each of these boats to the plaintiff for the sum of rupees 78 mentioned in the kobalah of sale produced by the plaintiff. The plaintiff and the two defendants Kuroona Doss and Ramjee Doss from that time became co-owners of the two boats, which they let out on hire in the waters of Calcutta for about two months. During these two months, the plaintiff received as his share of the net earnings of these boats the sum of about rupees 40 a month. In the month of Jyst, or about the month of May of the year 1866, a dispute arose between him and the co-owners of the two boats with regard to taking the boats to Bhudressur and there loading them with cargo for Calcutta, the plaintiff being unwilling to allow the boats to go out of the port of Calcutta and the defendants insisting upon their being allowed to do so. Against the plaintiff's remonstrances, the boats were at last removed to Bhudressur. The plaintiff, however, followed the boats to Bhudressur, took some proceedings at the Thannah, and the boats were removed from Bhudressur to Chandernagore within the French territory. Here,

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for the first time, the plaintiff saw the two defendants Kashee Nath Kooer and Modhoo Bhuttacharjee. These two persons told him that they had purchased the boats for rupees 110, and that they were the owners of the boats and declined to give them up. The two other individuals who were co-owners with the plaintiff seem to have disappeared about this time. The plaintiff applied to the Chandernagore authorities, and in a proceeding which took place between him and Modhoo Thakoor possession of the boats in Modhoo Thakoor was confirmed, and the plaintiff's claim dismissed. The plaintiff, then, in the month of August 1866, brought a suit in the Moonsiff's Court at Hooghly against Kashee Kooer, Modhoo Thakoor and other persons for the unlawful taking away of the two boats. His allegations in the plaint were that the defendants had forcibly taken the boats from Bhudressur into the Chandernagore territory, and although the suit was in form a suit for the detention of the boats and damages up to the institution of the suit, it substantially was a suit to recover possession of plaintiff's one-third share of the two boats by having his proprietary title thereto declared and by his being entitled to the profits made by the boats from day to day. In that suit, some of the defendants appeared and some did not: but the Court being satisfied that due processes had issued against all the defendants, gave a joint decree as against all of them under the terms of Section 191 Act VIII of 1859, which provides that when the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative, *if delivery cannot be had.* The Court declared the plaintiff's title to one-third share of the two boats, ordered possession to be restored to him in the way in which joint possession is capable of being given, and in case such remedy could not be had, a sum of rupees 78 was, as an alternative, assessed as the one-third value of the two boats. Damages at rupee 1-6 a day from the time of the wrongful taking away by the defendants of the boats to the filing of the plaint were also awarded. The plaintiff made various attempts to execute the decree, but he has been resisted in one way or another by the defendants, and up to this moment he has neither got possession of the boats, nor a single penny of damages that were awarded to him. The decision of the first suit was pronounced on the 11th September 1867, and confirmed on appeal on the 4th February 1868. After these ineffectual attempts, which continued from the 4th February 1868 down to the 27th March 1870, a period upwards of 2 years, the plaintiff filed the present suit against the same parties for further damages in respect of the non-delivery of possession of the boats, and this suit is in substance a suit to obtain from the defendants the profits which they are said to have obtained by the use of the boats from the time the first suit was first instituted down to the date of the present decree.

The case was tried by the Subordinate Judge and a decree given to the plaintiff. That decision was reversed by Mr. Bright, the Judge of Hooghly, on appeal. In special appeal, we considered Mr. Bright's judgment unsatisfactory, and we therefore reversed it and called the case on our own file to try it as a regular appeal. We did so because on a perusal of the papers and looking to the main facts of this case, we considered that great injustice had been done to the plaintiff, and that it was necessary in order to determine the case fully that the plaintiff himself and the defendants should be examined before this Court. The plaintiff has been examined and so have been the two defendants who appeared, *viz.*, Kashee Nath Koer and Modhoo Thakoor. The plaintiff in his evidence has fully confirmed the allegations stated to have been made by him in the course of the litigation, and has further sworn that between the date of his decree in the first suit and the present time he had on several occasions seen his boats at Chandernagore and that about a month ago he last saw his boats there. The plaintiff gave his evidence in a clear and satisfactory manner. He answered questions promptly, took no time to deliberate or think, and he impressed the Court, as also I believe every body present, that he was telling a truthful story and was giving a correct account of the misfortunes which have attended him since he became the part owner of the boats, and as to how he was made a victim of grievous wrong and oppression on the part of these two defendants conjointly with others. I fully believe his story, and that portion of it where he says that within a month or two of the present time he saw the boats at Chandernagore. The two defendants, Kashee Nath and Modhoo Soodun have been respectively examined. The mode of their giving evidence contrasts most strikingly with that of the plaintiff. Their answers are neither clear nor distinct. They

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repeatedly took time to think what they should say, and they impressed us with the belief that they were evidently saying what they knew to be false. The purport of their evidence was that Modhoo Thakoor purchased the boats from certain people for rupees 110; that he borrowed rupees 100 from Kashee Nath Koer, and paid rupees 10 from his own pocket; that having got possession of the boats, Modhoo brought a suit against the plaintiff and obtained a decree therein, and in 1866 Modhoo broke up the boats and sold the timber for fuel in the course of the trade he carries on. The story as told by Kashee Nath on the very face of it goes to show that he also did acquire some interest in the boat, because it was his money with which the boats were purchased. Beyond the bare statements of these two individuals whose evidence we distrust, there is nothing to show that the transaction of loan ever took place between the parties. There is not a scrap of writing produced, and we cannot understand why Kashee Nath, supposing he had advanced the money, should not have taken the precaution of keeping as security the very boats which were purchased. The explanation that he gives as to why he did not hold the boats as security, namely, that he knew there would be *hangama* (strong disputes) proves that he knew he was embarking in a wrong transaction with a view to deprive some other person of his right of property in the boats.

'In actions of wrong, not only those who commit the wrong are liable, but those who abet the tortious acts are equally liable, so even if we accept the story related by Kashee Nath, he would be a joint tort-feaser with Modhoo Thakoor; but as stated above, we do not believe the story of loan, unsupported as it is by any documentary evidence or by ordinary accounts such as these two men, admittedly in business, would generally keep. Thus the story is only supported by the evidence of two men who evidently made many false statements while under examination. Nor is there any evidence before us to satisfy us that these two persons purchased the boats, but the evidence does satisfy us that by the tortious acts of Kashee Nath, Modhoo and others, the plaintiff was deprived of his share and possession in the boats. Upon the evidence, therefore, we come to the finding that the persons who wrongfully got possession of the boats were Kashee Nath and Modhoo Thakoor among others, and we consider that finding was already arrived at in the first suit in which it was held that they in conjunction with others removed the boats from Bhudressur. Now although in the eye of the law, Kashee Nath and Modhoo were not guilty of robbery or dacoity in respect of the boats, because it is alleged that they got peaceable possession of the boats from two part owners, still there can be no reasonable doubt that the act committed by them amounted to and resembled robbery both daring and impudent. The story told by them while under examination that the boats were broken and sold for fuel appears to us to have been invented very recently, because we do not find any such statement made in any stage of the pleadings in the last or the present suit by either of them prior to the day of their examination, and no accounts or deeds show the probability even of its truth. Such a statement was all material in the first suit where the decree directed that the defendants should deliver up the boats. If the fact that the boats had been broken up been either mentioned or proved in that suit, the decree would not have been passed in that form. Kashee Kooer has put in a written statement. There is not a single word in that statement to show that the boats had been broken up, and when we couple this conduct of the defendants with the present testimony of the plaintiff that he saw the boats at Chanderuagore within a month or so, we feel no hesitation in saying that these two defendants have committed perjury in stating on oath that in 1866 the boats were broken up and sold for firewood.

We may further observe that it has been satisfactorily proved to our minds that these witnesses carried on trade or business at Chandernagore. They admit that they had books of account, but they say that those books were destroyed by the well-known Cyclone which destroyed so much valuable properties. We, however, disbelieve this story altogether, and we consider that these books of account which would probably prove what were the actual earnings of the boats have been purposely kept back. This circumstance engenders in our minds the strongest suspicions, and it is calculated to throw considerable discredit on the evidence of these witnesses and to support the plaintiff's case. Under these circumstances, we are clearly of opinion that since the passing of the decree in the first suit, these two boats have been fraudulently detained by the two defendants.

The next question is as to whether the defendants are liable in an action brought in the present form.

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It must be observed that the decree in the first suit gave the plaintiff damages up to the date of the filing of the plaint therein, and the present suit is brought for damages from the filing of that plaint to the date of recovery of possession.

It is contended by Baboo Gopal Lall Mitter that the plaintiff ought to have included all the damages in the first suit, and that this second suit for damages will not lie. Now, it is quite clear that the only mode by which the plaintiff could possibly have included all damages in the first suit would have been by a decree so framed as to direct the ascertainment of damages subsequent to the filing of the plaint down to the time of ascertainment. Such a decree, we apprehend, the plaintiff might readily have obtained, and had he obtained such a decree the subsequent damages would have been ascertained during the execution of the decree.

It is but reasonable that the plaintiff should be entitled to obtain in some way the earnings of the boats from the time of their wrongful detention until he recovers possession of them. It appears to us, having regard to the constitution of the Courts of this country, which are governed by principles of justice, equity, and good conscience, that whether the claim for subsequent damages be made in the execution of the first decree or in a regular suit, the plaintiff should be re-imbursed damages for the time during which he is kept out of possession by the wrongful act of another party, and it must not be forgotten that the plaintiff did claim to have subsequent damages assessed in execution of his first decree, but he was referred to a regular suit.

We are generally unwilling to apply the strict technical rules of the English law to cases that arise in this country where the Courts of Justice have a broad guide, *viz.*, the principles of justice, equity and good conscience, to regulate their actions; whereas English Courts are stringently bound by precedents and procedure. When a pleader of the position of Baboo Gopal Lall Mitter, a gentleman of great ability and perfect integrity in the conduct of his client's cases, advances such an objection as the one already mentioned, it is desirable that we should meet his arguments by authorities. To show, therefore, that our judgment is in strict accordance with principles of the English law, I quote from Addison on the Law of Torts, page 442 :—"In the old action "of detinue, the defendant had the option "of retaining possession of the chattel de-"tained, paying to the plaintiff the sum at "which the jury thought proper to assess its "value. The judgment, observes Hardwicke, "C. J., is that the plaintiff shall recover "the goods or their value; then shall issue "a writ to the Sheriff to distrain the defen-"dant to deliver the goods, and if he will "not, then the value as it is taxed by the "inquisition. And so it is in the election "of the defendant to deliver to the plaintiff "the goods or the value. This option on "the part of the defendant being felt to "operate as a hardship upon the plaintiff in "many cases, it has been taken away by the "Common Law Procedure Act, 1854, which "enacts, Section 78, that the Court or a "Judge shall have power if they or he see "fit so to do, upon the application of the "plaintiff in any action for the detention of "any chattel, to order that execution shall "issue for the return of the chattel detained "without giving the defendant the option "of retaining such chattel upon paying the "value assessed; and if the chattel cannot "be found and unless the Court or a Judge "should otherwise order, the Sheriff shall "distrain the defendant by all his lands and "chattels in the Sheriff's bailiwick till "the defendant renders such chattel, or at "the option of the plaintiff that he cause to "be made of the defendant's goods the as-"sessed value of such chattel, provided that "the plaintiff shall, either by the same or "a separate writ of execution, be entitled "to have made of the defendant's goods the "damages, costs and interest in such ac-"tion. The jurisdiction of the Judge under "Section 78 of this Statute is solely appli-"cable to a case where the value is found, "so that no order can be made where such "value has not been found. The regular "and legal finding of the jury under Section "78, is a finding of so much for the value "of the thing detained, and so much by way "of damages for its detention. If the value "of the chattel is not assessed by the jury, "the course provided by Section 78 is not "applicable. The Court of Chancery has "also jurisdiction to order a specific chattel "to be delivered up to the person seeking "to enforce his right to it, where the latter "has not fixed the price of the article or as-"sessed its value, and thereby furnished the "measure of his own damages."

And here I may notice that the words of Section 191, Act VIII of 1859, are in strict

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accordance with the provisions of the English Law, that a certain amount of money should be allowed as an alternative if delivery of the chattel in dispute cannot be had. If the goods are capable of delivery, they must be delivered ; if they are not capable of delivery, then assessed damages should be paid. What Mr. Rochfort asks is quite reasonable. He asks for the delivery of the boats, and also damages for the boats, which, notwithstanding the first decree of the Court, have been illegally detained from him up to the present time, at the rate which had been originally awarded.

In page 443, Addison on Torts, it is said:— "Those who take upon themselves to detain "the property of another are answerable for "all the consequences that naturally result, "in the ordinary course of things, from the "wrongful act."

Considering, therefore, the gross contempt exhibited by these defendants of the order of the Court by illegally detaining the boats, considering the loss that has been occasioned to the plaintiff in consequence of this illegal detention, and being satisfied that the defendants persist in secreting and illegally detaining the boats, we are of opinion that this action for damages is maintainable. This disposes of the first objection raised by Baboo Gopal Lall.

It is then argued by Baboo Gopal Lall Mitter that we have no jurisdiction in this case, inasmuch as the defendant Kashee Nath is a resident of Chandernagore, and we have no jurisdiction over people of that place. Now, if such were the case, and we were satisfied that we had no jurisdiction, however strongly we might be impressed with the justice of the plaintiff's case, we should have to yield to the objection and dismiss this suit. But it is to be observed in the first place that this suit is only supplemental to the first suit, a continuation of the former suit, the plaintiff seeking to assert and follow out the right which he asserted in the first suit, and therefore as the jurisdiction of these Courts existed over the subject matter in that suit, we may hold that jurisdiction exists in this suit also.

Secondly, from the facts of this case, we consider it sufficiently established that jurisdiction exists. There can be no doubt as regards the defendant Modhoo Thakoor, for he is a resident of Hooghly, and therefore subject to the jurisdiction of these Courts. With regard to the defendant Kashee Nath, we have to observe that he has a house at Sirsa in Hooghly occupied by his wife, family and children, but it is alleged and the allegation is confirmed by the plaintiff that he carries on business at Chandernagore, and for that purpose he at times resides there. Now the question is whether the defendant was "dwelling" at Hooghly at the time of this suit. It has been held by Sir Mordaunt Wells, and subsequently by several authorities, that the mere fact of a person going out to another jurisdiction for a few days and for a temporary purpose, is not sufficient to make out that he is "dwelling" in that jurisdiction so as to take him out of the jurisdiction of the Court within which his home is situate. If the defendant went to Chandernagore for a temporary purpose, he would clearly be within our jurisdiction, but it is alleged that he had gone there for a permanent purpose, that is to say, to carry on trade there as a broker. We think, however, that for whatever purpose he may have gone there, while he has a house at Hooghly where his family resides, and there is an "*animus revertendi*," that family dwelling house must be considered to be his dwelling place. He may no doubt remain during the day at one house and sleep at another, but his dwelling place must be taken to be that where his home is, and his home is where his family resides.

In addition to this, we have it from the evidence of the defendant himself that his boats work between the waters of Calcutta and Chandernagore, and there is no reason to believe that he lived permanently at Chandernagore, and did not reside at Calcutta for the purpose of loading and unloading and carrying on his business by means of the boats. Coupling, therefore, these facts with the significant fact that the defendant has a home at Hooghly where his wife, children and family reside, and which is his permanent dwelling place, we are of opinion that we have jurisdiction over the defendant Kashee Nath.

There is one more objection taken by Baboo Gopal Lall. He says that the proceedings by the French Court determined the right to the boats, and he pleads *res judicata*. Now, in the first place, whatever bar there was between the parties, the same ought to have been pleaded in the first suit and not in this. The first suit determined the title of the parties ; this suit is founded upon the decree in the first suit. In the second place, the plea of *res judicata*, so far as Kashee Nath was concerned, would not

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apply, for he was no party to the proceedings before the French Court. But I would go further. The Chandernagore Court took jurisdiction in this matter in consequence of the information given in the Criminal Court with regard to the removal of the boats. The simple question was one of possession between Modhoo Thakoor on one side and the complainant on the other, and all that the Chandernagore Court could dispose of would be. not the proprietary title, but the possessory title in Chandernagore. I believe by the French law the present plaintiff not being an inhabitant of Chandernagore could not sue the defendants there for a declaration of his title. The complaint was brought in respect of illegal detention of the boats, and the simple question was whether those boats were in the possession apparently lawful of Modhoo Thakoor, or not. I do not think, therefore, that the plea of *res judicata* can hold good. For all these reasons, we are of opinion that the two defendants above named have illegally detained the boats, and that therefore the indemnity which the plaintiff is entitled to demand is his proportion of the daily hire of the boats.

The result of our judgment, therefore, is that the plaintiff will be entitled to a decree for damages at the rate of one rupee a day for the two boats from the date of suit down to the date of this decree. The total of such sum will be the principal carrying interest at the rate of 12 per cent. per annum. If the boats cannot be had in execution, or in a proper state, the plaintiff will not be entitled to go on suing from time to time, but he shall receive interest at rupees 12 per cent. upon the sum so awarded.

In this case, we regret to observe that great injustice has been done to the plaintiff and that he has suffered grievous injury. He, a poor man, had, by begging, got together a few rupees which he applied in purchasing a share in two boats, but of which he has been deprived by one of the most remorseless acts that have ever come to our notice. It will, therefore, be the duty of this Court to see that justice is meted out to the injured plaintiff, and that he is relieved from the position of penury and beggary to which he has been reduced by the wicked and fraudulent conduct of the defendants. No Courts of justice are more generous and humane in their endeavours to do justice than the French Courts; and I have no doubt that if proper representation be made to the Chandernagore authorities to aid the plaintiff in this matter, some redress will be afforded to the suffering party. The conduct of the defendants has all throughout this litigation been characterized by fraud and hard-heartedness. Their depositions before this Court are tainted with gross falsehood and perjury. It would have been our duty to have sent them before the Criminal Court, had we felt that those false statements could have been sufficiently exposed so as to justify a conviction. We hope that the harsh and remorseless conduct with which the defendants have so long obstructed the plaintiff in his righteous cause will henceforth cease. We also hope that the gentlemen who have so kindly assisted the plaintiff in this case will see what further can be done for their client, and if they can find out, or be satisfied about the existence of the boats, this Court will be happy to lend its fullest aid in restoring them to the plaintiff, and if it be necessary to apply to the French authorities, will gladly do it to see that the ends of justice may be fully attained.

In conclusion, we have to express our thanks to Mr. Rochfort and Baboo Ashootosh Dhur for having kindly taken up the plaintiff's case and done every thing that could be done in his behalf; and also to Baboo Gopal Lall Mitter for the defendant, who has very ably argued the case, making all proper concessions and displaying as much sympathy as, a counsel for the defence, he could fairly show in regard to the hardship of the plaintiff's cause. The decree of the Lower Appellate Court will be reversed with all costs, and a decree will be made as indicated in this judgment.

Bayley, J.—I am also of opinion that the plaintiff's suit should be decreed in the form stated by Mr. Justice Paul, with interest at 12 per cent. per annum. I have never in my experience of witnesses seen two such contrasts as the evidence of the plaintiff and the defendants in this case when subject to the examination and cross-examination by the pleaders and the Court. The promptitude, readiness, clearness, and evident absence of duplicity with which the plaintiff gave his statement impressed me with the conviction that he spoke the truth, whereas the hesitation, duplicity and demeanor and evasiveness with which the two defendants Kashee Nath and Modhoo Thakoor gave their evidence quite plainly showed that their statements were altogether false, that they narrated a story made up shortly before their examination. I have no

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doubt that they have grossly perjured, and that their conduct is such as deserves punishment from a Criminal Court if it could be proved.

With regard to the question of jurisdiction, I also agree with Mr. Justice Paul. It is admitted that the defendant Kashee Nath has a house at Hooghly which is occupied by his wife, family and children. It has been held by Sir Barnes Peacock that "where a man was temporarily imprisoned "beyond the Court's jurisdiction, but had "his fixed residence and his wife and family "within it, he was within the jurisdiction "of the Court." Again, "A man's dwelling is *primâ facie* the place where his "wife and family reside, and if he has a "dwelling place in one place and occupy a "house and occasionally sleep in another, he "will not be a resident in the latter place, "for his residence is his domicile, and his "domicile is his home, and his home where "his family resides." (Story's Conflict of Laws). So that under these authorities, wherever the defendant may have resided for a temporary purpose, his "dwelling" must be taken in this case to be that where his family and children live. In addition to this, it has to be observed that the defendant himself has stated in his deposition that his boats worked for gain between Calcutta and Chandernagore. Now there is no place between these two stations except the waters of the Hooghly, and certainly below the low water-mark the waters of Hooghly are within the jurisdiction of the British territory.

I quite agree with Mr. Justice Paul that this has been a case of very great hardship to the plaintiff, and that it will be our duty to render him every possible assistance to avail himself of a decree in the execution of which he has been obstinately opposed by resorts to false sales and foreign jurisdictions.

The 6th September 1871.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Erroneous consent by Vakeel—Clients' obligations—Instalment bond — Mortgaged property — Surplus proceeds.

Case No. 554 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 28th Febuary 1871, *affirming a decision of the Subordinate Judge of that District, dated the 27th July* 1870.

Ram Kant Chowdhry (Plaintiff) *Appellant,*

versus

Brindabun Chunder Doss and others (Defendants) *Respondents.*

Mr. C. Piffard for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Where a vakeel upon a mistaken view of the law goes beyond and contravenes his instructions, his erroneous consent cannot bind his client.

Where money is lent upon the security of immoveable property of a nature incapable of division, and the mortgagee, on one of the instalments becoming due, has to sell the entire property, he does not thereby lose all lien over the surplus proceeds.

Jackson, J.—THE plaintiff in this case sued to recover from the defendants money which he alleged had been wrongfully paid under an erroneous order of Court to the defendants, being the surplus proceeds of a sale in execution, to which the plaintiff alleged himself to be entitled under the following circumstances :—

Plaintiff lent to Greesh Chunder Bose and others on a bond specially registered the sum of rupees 16,600 payable by instalments ; and by way of security for the due payment of this amount various properties were pledged by the deed. One of the instalments falling due, and not being paid, the plaintiff proceeding under Section 53 of the Registration Act obtained a decree for money simply, in the year 1867, and in

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execution of such decree he procured the sale of a portion of the property already mortgaged. This property he himself purchased. It does not appear what precise proportion the property sold bore to the whole property mortgaged. But it seems that after payment of the instalment then due, there remained a surplus of about 1,850 rupees in the hands of the Court. It seems that these debtors had other liabilities, and the defendants in this suit, as well as other persons, had taken out execution against them. They accordingly put in attachments, and applied for an allotment of the balance in the hands of the Court. This application was resisted by the plaintiff on the express ground that the contract between him and the judgment-debtor reserved his lien over the balance of the purchase money arising from the sale of a portion of the property mortgaged to him. In the mean time, a further instalment becoming due, the plaintiff again proceeding under Section 53 obtained a second decree in July 1868, in which, it appears, a declaration to the effect that plaintiff should realize the amount of his decree from the mortgaged property was inserted; and plaintiff accordingly availed himself of this declaration in resisting the attempt of other creditors to withdraw the balance in the hands of the Court. It appears that after this the plaintiff's vakeel, having come to terms with the vakeel of the other parties, consented that there should be a ratable distribution of the surplus money; and accordingly he took out a portion, and the defendant also took out a portion of the money; and it is for the recovery of the portion so taken by the defendants that this suit is brought. The suit was dismissed by the Subordinate Judge; and the District Judge, although he did not entirely concur in the opinion of the Court of first instance, concurred with him in dismissing the suit.

Mr. Piffard appears for the plaintiff in special appeal, and has afforded us considerable assistance by the argument which he addressed to us.

We have two questions to consider. The first is whether plaintiff is concluded by the action of his vakeel in the execution proceedings: if the vakeel is entitled to bind the plaintiff by the consent which he gave, then manifestly a suit to recover the money taken away with his consent cannot be maintained.

We consider that in this case the vakeel, upon a mistaken view of Sections 270, 271, Code of Civil Procedure, went beyond and indeed contravened his instructions which were to maintain the plaintiff's right to the whole of the money in Court, and that his erroneous consent ought not to prejudice his client or operate as a bar to his bringing the present suit.

The next question which arises in this case is, whether the plaintiff had such a lien on the surplus proceeds as to entitle him to recover it from the hands of the defendants.

It appears to us after a full consideration that he had. The money was lent upon security of certain immoveable property, and was to be repaid by instalments. It might well have been that the property pledged should be of such a nature as to be incapable of division; and that the plaintiff on one of such instalments becoming due would have to sell the entire property. Could it be said that he would, by bringing the entire mortgaged property to sale for the recovery of one instalment, lose all lien over the surplus proceeds? Assuredly we think not.

It seems then to make no difference that in this case the property was capable of being divided. The question as to what portion of the property should be sold for the instalment immediately due would be rather a question to be considered as between the mortgagor and mortgagee by the Court executing the decree, and is not a question which arises in the present suit.

We think that the orders passed in execution must be considered to have been properly made; and we are of opinion that the decree-holder, having sold, as under the contract he was entitled to, a portion of the property mortgaged, merely converted the property over which he had a lien into money and appropriated such portion of that money as would cover the claim then adjudged and due to him, but that he did not thereby part with his lien over the remainder of such money any more than he parted with the lien he had over the remainder of the property mortgaged.

We, therefore, think that the decisions of the Courts below were erroneous, and that plaintiff was entitled to recover the surplus proceeds from the defendants, with interest from this date at 6 per cent.

The appeal will be allowed with costs.

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The 7th September 1871.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Damages—Valuation—Jurisdiction.

Case No. 613 of 1871.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 23rd February 1871, *reversing a decision of the Sudder Moonsiff of that District, dated the 21st November* 1870.

Joy Doorga Dassee (Plaintiff) *Appellant,*

versus

Manick Chand Baboo and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Rash Beharee Ghose for Respondents.

In determining the jurisdiction of the Court in a suit for damages, the amount claimed, and not that eventually found due, must be taken as the valuation.

Jackson, J.—THE plaintiff in this case originally laid her suit at rupees 600 as damages. The Moonsiff upon trial found that the plaintiff was entitled to damages; but that the amount thereof was only rupees 305. He, therefore, gave the plaintiff a decree for that amount.

On appeal by the defendant, the District Judge considers that as the damages were ultimately found to amount only to rupees 305, the Moonsiff by his own finding was ousted of jurisdiction, the case being within the cognizance of a Small Cause Court; and therefore he reverses the judgment arrived at by the Moonsiff.

The plaintiff appeals specially. It appears quite clear that not the amount eventually found due as damages is to determine the jurisdiction of the Court, but the amount which the plaintiff claims. The plaintiff might, if she chose, have abandoned a portion of her claim so as to bring her suit within the jurisdiction of the Small Cause Court; but she was not bound to do so. If the plaintiff claims a sum which it is beyond the jurisdiction of the Small Cause Court to take cognizance of, she is entitled to bring her suit in the ordinary Civil Court having jurisdiction to entertain it. The special respondent before us does not attempt to justify the judgment of the Judge; but he contends that the special appeal ought to fail upon other questions which arise in the case. We think that as there has been no trial of the case upon the merits, we ought not to enter into these points, but that we ought to remand the case for trial.

The judgment of the Lower Appellate Court will be set aside and the case remanded for trial upon the merits. Costs will follow the result.

The 7th September 1871.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Decree—Jurisdiction.

Case No. 582 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 3rd February 1871, *reversing a decision of the Deputy Collector of Dukhin Shabazpore, dated the 30th September* 1870.

Bukshoollah Chowdhry (Plaintiff) *Appellant,*

versus

Hur Chunder Chund (Defendant) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Bykuntnath Doss for Respondent.

It is within the province of a District Judge to know, and it is his business to declare if he knows, whether a decree, produced before him, of a Court within his district, was obtained in a proper Court.

Jackson, J.—THE objection taken in this case is that the Judge has refused to recognize the decree obtained by the plaintiff in

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1863. He observes that each party is in possession of a decree; one on the side of the defendant of 1861, and the other the one which we have just mentioned. The Judge also observes that the decree which the defendant holds is one obtained in a proper Court; and the other, that of the plaintiff, was obtained in a Court which had no jurisdiction to pass such a decree. It is contended that he had no evidence on which he could come to the conclusion that the decree of 1863 was obtained in a Court not having jurisdiction to make it; and that he has not recorded, as a matter judicially noticed, that that is so; and therefore his decision is without legal foundation.

It appears to us that the Judge has declared a matter which was within his province to know, and which it was his business to declare if he knew it, namely, whether the decree produced before him purporting to be a decree for rent of a Court within his district, was obtained in a proper Court or no; and the special appellant gives no reason for supposing that the declaration so made by the Judge is in fact wrong.

We think, therefore, that the special appeal must fail, and the decision of the Lower Appellate Court must be affirmed with costs.

The 8th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble H. V. Bayley and G. C. Paul, *Judges*.

Native Christians—Marriages.

Reference to the High Court, under Section 17 *Act IV of* 1869, *by the Officiating Judge of Backergunge, dated the 21st February* 1871.

Kristo Mohun Christian, *Petitioner*,

versus

Anunda, *Respondent*.

The question as to the validity of the marriage of Native Christian converts does not depend on the presence or otherwise of an ordained Minister of religion.

Norman, C. J.—This is a case which comes before the Court for confirmation of a decree dissolving a marriage on the ground of the adultery of the wife who left her husband's house and persisted in leading the life of a prostitute notwithstanding repeated efforts on the husband's part to reclaim her. The only point is as to the marriage which was celebrated by Kenaram, a teacher of Christian converts under the Burisal Baptist Missionary. He says—"I married the parties about 10 years ago in the Church at Asgor Sen. I produce the register of Marriages. "No. 261. 23rd May 1861, is the entry re-"lating to the marriage of the petitioner and "respondent. The entry of the marriage, the "signatures of the parties and witnesses are "all in my handwriting. I had verbal au-"thority from Mr Page, then in charge of the "Burisal Mission, to marry, baptize and ad-"mit converts. I used to perform these "ceremonies for about ten years up to the "passing of the new Act. I have no powers "under the present Act and do not perform "marriages. The ceremony performed was "to cause the persons to be married; to de-"clare in the presence of witnesses that they "took each other in marriage and promised "to cherish, &c., each other during life. I "then joined their hands and repeated the "words 'Whom God hath joined together, "let no man put asunder.'"

According to the general law of all Christendom a contract "per verba de præsenti" where the parties in the presence of witnesses solemnly declare that they take each other in marriage, followed by co-habitation, is deemed an actual marriage. That law has been more or less qualified in different countries by legislation. It has been qualified in England.

But I think it must be considered as clear that the Common Law of England based on an Institute of an Anglo-Saxon King requiring the presence of an ordained priest to celebrate a marriage has never been introduced into the Mofussil, and therefore that the question as to the validity of the marriage of native Christian converts does not depend on the presence or otherwise of an ordained Minister of religion.

In Maclean *versus* Cristall, Perry's Oriental Cases, page 75, it was held that the presence of a priest in holy orders was not essential to constitute a valid marriage even between two European British subjects at the city of Surat in India. See also Latour *versus* Teesdale, 8 Taunton, page 830.

In the present case, all difficulty is removed by the 10th Section of the Indian Marriage Act V of 1865, which enacts that "all

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"marriages which shall have been solemnized "in India before the commencement of this "Act by persons who have not received "Episcopal ordination or who have not otherwise received express authority to solemnise such marriages under Acts of Parliament or Acts of the Governor-General in "Council shall, if not otherwise invalid, be "deemed valid to all intents and purposes."

We have read the evidence and are satisfied that the decree dissolving the marriage ought to be confirmed.

Bayley, J.—I am of opinion that on the evidence on the record, the decree of the Judge of Backergunge dissolving the marriage ought to be confirmed.

Paul, J.—I concur in confirming the decree passed in this cause dissolving the marriage of the parties.

The 9th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Conjugal separation—Right of suit.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Midnapore, dated the 15th May 1871.

Ellen Victoria Hughes, *Plaintiff*,

versus

Arthur John Hughes, *Defendant*.

A suit is not maintainable by a wife for an allowance from her husband on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband, such stipulation falling within the general rule that a deed of separation entered into by husband and wife without the intervention of trustees is void.

Norman, C. J.—THIS is a suit by Mrs. E. V. Hughes against Arthur J. Hughes, her husband, for one month's allowance, rupees 150, under the following agreement:—

"Memorandum of agreement entered into "between Arthur John Hughes and Ellen "Victoria Hughes on the 13th February "1871.

"1. The said Arthur John Hughes agrees "to pay on or before the 15th of every "month to the credit of the said Ellen Victoria Hughes into any bank which may be "selected by her the sum of rupees one hundred and fifty only.

"2. The said Ellen Victoria Hughes "does hereby covenant and agree that so "long as she receives maintenance at the "rate aforesaid from the said Arthur John "Hughes, she will not communicate "with and molest him in any way, and she "further undertakes not to run into debt, and "to be responsible for all debts contracted "by her."

Both parties are European British subjects. The Officiating Judge of the Small Cause Court of Midnapore, Baboo Judoo Nath Mullick, dismissed the suit subject to the opinion of this Court.

We are of opinion that the suit cannot be maintained;—not on the question of form, because we do not doubt that in the Courts of this country a married woman is competent to maintain a suit if she has a cause of action:—but on the broad ground that no suit is maintainable on the agreement by Arthur J. Hughes to pay to his wife rupees 150 a month.

The principal, and in point of law the sole, consideration for that agreement appears to be the stipulation that the wife is not to communicate with or molest her husband,—a provision the object of which is simply to provide for continued separation and the cessation of all connubial intercourse, which taken by itself is contrary to public policy. The stipulation falls within the general rule stated by Story that a deed of separation entered into by husband and wife without the intervention of trustees is void. In deciding this, we do not desire to be understood as saying that if for a good consideration—as, for instance, the wife relinquishing her equity to a settlement, or as a compromise of an intended suit for judicial separation, to avoid public scandal—a husband were to agree to pay his wife an annuity the wife might not enforce her right by a suit in a Mofussil Court in this country.

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The 11th September 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Usufructuary mortgages—Interest—Time for payment—Foreclosure.

Case No. 114 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 27th February 1871.

Gunga Pershad Roy and others (Defendants) *Appellants,*

versus

Bibee Enayet Zahera and others (Plaintiffs) *Respondents.*

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Mr. R. T. Allan and *Baboos Huree Mohun Chuckerbutty* and *Rughoobuns Sahoy* for Respondents.

In an usufructuary mortgage where there is no stipulation for interest, the mortgagee is not entitled to it, the usufruct going in lieu of interest.

The effect of a stipulation as to re-payment at a specified time is to entitle the mortgagee, if so minded, to foreclose at that time in the event of re-payment not being then made.

Jackson, J.—This appears to me to be a very plain case.

The ancestor of the plaintiffs, in the year 1825, mortgaged a fractional share of two mouzahs in the district of Sarun to the ancestor of the defendants in consideration of a loan of 5,000 sicca rupees.

The contract between the parties, which was reduced to writing, contains no stipulation for interest, but it was agreed that the principal amount should be repayable on a date mentioned, namely, by the end of Bhadro 1259, in default of which the sale was to become absolute.

The amount was not repaid within the period specified, but the wife of the mortgagor in the year 1861 brought a suit in which she sought to recover possession without payment of any sum by way of principal, on the allegation that the mortgagee had derived from the property in his possession profits equivalent to the entire amount of principal together with interest at 12 per cent. per annum. This suit was dismissed in the year 1863 by the Principal Sudder Ameen.

The mortgagee subsequently, on the 14th March 1866, presented a petition of foreclosure, and on the 28th November of the same year presented a further petition reciting that by agreement between the parties the term of grace was further extended to Bhadro 1275, and that on payment of the sum stipulated in the bond within that time, the mortgagor would be entitled to recover possession of the property. The mortgagor has now paid into Court a sum (in Company's Rupees) of 5,350-9-7 being the equivalent of the 5,000 sicca rupees originally, and claims possession of the property.

The defendants, the mortgagees, in their written statement alleged that they were entitled to a large sum, namely, 5,342 rupees, as unliquidated interest, and claimed to retain the property until that amount was paid.

The Subordinate Judge who tried the suit was of opinion that by the contract between the parties, the usufruct was to be taken by the mortgagee in lieu of interest, and that the plaintiffs were entitled to recover possession of the property on payment of the bare principal, and he gave a decree accordingly.

The defendants have come up in appeal, and they contend that inasmuch as the contract between the parties was not carried out in precise accordance with its terms, that is to say, the amount of principal had not been repaid within the date originally stipulated, namely, the end of Bhadro 1259, the plaintiffs could only be entitled to possession of the property after an account taken on the basis of the mortgagee being entitled to interest at 12 per cent. upon the principal; and that unless it was shown that the usufruct amounted to more than such interest, the mortgage would subsist.

It appears to me there is no ground for this contention. We are referred to the case of Forbes against Ameeroonnissa Begum in X Moore's Indian Appeals, page 340,* and to the case of Shah Mukhun Lall against Baboo Sree Kishen Singh in XII Moore's Indian Appeals, page 159.† The case of Shah Mukhun Lall differs entirely from the present. In that case, the plaintiff, on payment of a sum of money from the defendant on the security of immoveable property, had

* 5 W. R., P. C., p. 47.

† 11 W. R., P. C., p. 19.

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given a lease of that property for 20 years; and he brought his suit in order to recover possession of the property before the expiration of the 20 years. The Judicial Committee of the Privy Council held that as the plaintiff sought to set aside his contract, he could only recover possession of the property on equitable terms, and therefore ordered that he should pay interest at the rate of 12 per cent. instead of 9 per cent., the rate stipulated in the bond. The case of Forbes against Ameeroonnissa Begum does not appear to me to affect the case at all.

In the present case, however, there is no stipulation for interest. The ordinary understanding in these agreements is that where there is no stipulation for interest, the mortgagee is not entitled to interest, but that the usufruct goes in lieu of interest. The effect of the stipulation as to re-payment in Bhadro 1859 was, it seems to me, that the mortgagee, if he was so minded, would have been entitled to foreclose his mortgage at that time. He did not choose to do so, and thought it for his interest to hold on the property; and upon his finally issuing the notice, the plaintiff has come in and done that which he was bound to do, namely, paid into Court and tendered the amount of the principal advanced.

There is a point in the case, namely, that in the previous suit by Mussamut Ruhman she had herself declared that interest would be payable at the rate of 1 per cent. per mensem. But that arose under these circumstances. In that suit the plaintiff sought to recover possession of the property without payment of the principal, alleging that the usufruct of the property had at that time covered both principal and any reasonable interest, which she fixed at 12 per cent., the usual rate of interest allowed by the Courts. That suit was dismissed, and the mere suggestion there made of accounting at the rate of 12 per cent. will not affect the contract between the parties.

Under these circumstances, it appears to me that the Court below was perfectly right in giving the plaintiff a decree, and this appeal must be dismissed with costs.

Macpherson, J.—I concur. There is no ground whatever for the contention that the plaintiff has been foreclosed because interest at 12 per cent. was not deposited in addition to the principal.

The 12th September 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Minor's estate—Liability of guardian.

Case No. 664 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 17th April 1871, affirming a decision of the Subordinate Judge of that District, dated the 17th January 1870.

Gireewur Singh and another (Plaintiffs) *Appellants,*

versus

Muddun Lall Doss (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Gopal Lall Mitter for Respondent.

Where an act done by a guardian is one arising naturally out of the management of the minor's estate, and especially where it is concurred in by other co-sharers of the same property, the liability for such act attaches not to the guardian, but to the estate.

Jackson, J.—No doubt the decision of the Lower Appellate Court might have placed the questions which arose in this case in a somewhat clearer light than they have been placed; but it does not appear to me that the plaintiff has suffered any injustice by the result of the suit, or that we are required in the interests of justice to disturb the decision in which both Courts have concurred.

The suit was to set aside the sale by the plaintiff's mother of a fractional share in a certain property which the plaintiff had inherited from his father.

It appears that a decree had been given against the mother, acting as a guardian

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upon a suit for wassilat by a person who had purchased a 7 annas share of this property, and in execution of the decree the share of the minor had been attached and was about to be sold, when the mother, not describing herself as the guardian of the minor, but as the widow of the late owner, conveyed away the minor's share; and it is this sale which the minor seeks to set aside.

The defendant, however, alleged that the sale had been made by the widow as guardian; that the decree and the liability were such as would affect the minor; and that, moreover, the mother had received and the plaintiff was now in the enjoyment of the mokurruree of 100 beegahs, being part of this estate, at a mere nominal rent, which was a part of the consideration for which she consented to the sale of the share.

Now this part of the case was altogether suppressed by the plaintiff; and the Courts below, having gone into the case, appear to have come to the conclusion that the defendant's allegations are in substance true.

In considering whether a minor is bound by a decree against his guardian, the nature of the act committed by the guardian which led to the decree against her would have to be taken into consideration. If she had gone out of her way to do a wrongful act—an act which did not properly arise out of her management of the minor's property,—probably she would be personally liable and the minor would not be bound. But where the act done is one arising naturally out of the management of the minor's estate, and especially where it is concurred in by other co-sharers of the same property, there seems to be no reason why the liability should be declared to be that of the guardian and not of the estate which she is managing. Taking into consideration also the fact that the plaintiff is in possession of part of the consideration which the mother received, and that he has not either mentioned this matter or showed any disposition to give up that benefit, I consider that not having disclosed the whole of the facts which the Court would have to be acquainted with before it could do justice between the parties, he is not entitled to the relief he claims. It seems to me, therefore, that the decision of the Court below is in substance correct.

The appeal will be dismissed with costs.

Macpherson, J.—I concur.

The 13th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice.*

Court Fees' Act, 1870—Stamps—Letters of administration.

Case referred to the Chief Justice by Mr. R. Belchambers, Taxing Officer of the High Court, under Section 5 of the Court Fees' Act, 1870.

In the goods of Lieutenant-General Peter Innes, deceased.

When letters of administration are granted in respect of property which is subject to a mortgage, the value of the property for the purposes of estimating the *ad valorem* duty payable under the Court Fees' Act, 1870, is the value of that with which the Administrator is to deal, *viz.*, the value of the entire property less the amount of the incumbrance.

Where an *ad valorem* stamp duty had been paid on a portion of the property of the testator under letters of administration which were valid until revoked, it was held that in determining the stamp to be affixed to new letters of administration to be granted, credit should be given for the amount of duty which had been already paid and such duty was not payable a second time.

Reference.—On 9th June last, letters of administration of the property and credits of Lieutenant-General Peter Innes, deceased, were granted by the Judge of Simla to the Secretary of the Simla Bank Corporation as to a creditor, without notice to the Administrator General, who, under Section 15 of the Administrator General's Act, 1867, is entitled to letters of administration in preference to "a creditor, or legatee other than an universal legatee, or a friend of the deceased."

It would seem that the property in respect of which the letters of administration were granted was taken to be of the value of rupees 10,000, for it was on that amount that the *ad valorem* fee of two per centum, prescribed by Clause 11 Schedule 1 of the Court Fees' Act, was paid.

On 22nd August last, the Judge of Simla, on the application of the Administrator General, cancelled the letters of administration so granted by him to the Secretary of the Simla Bank, subject to the costs, including the *ad valorem* fee of rupees 200, being paid out of the assets of the deceased.

The property of the deceased is estimated by the Administrator General to be of the value of rupees 200,000; but, as stated by

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him, "there are mortgages, charges, and incumbrances to the amount of rupees 1,53,000 and upwards."

The Administrator General, who has now obtained from this Court letters of administration of the property and credits of the deceased, submits that he is liable to pay probate duty in respect only of the difference between the above two sums of rupees 200,000 and rupees 1,53,000, and that the amount payable as probate duty should be reduced by rupees 200, that sum having been already paid in respect of the former letters of administration.

Under the English Stamp Act, 55 Geo. III, C. 184, probate duty is payable on the value of the estate and effects of the deceased, "without deducting anything on account of the debts due and owing from the deceased." It is not until the debts have been actually paid that the return of stamp duty on the amount of the paid-up debts may be claimed under the provisions of Section 23 of 5 and 6 Vict. C. 79.

The Court Fees' Act, like the English Stamp Act, contains no provision under which the payment of probate duty may be exempted on account of debts in anticipation of the debts being paid; nor does it contain any provision for the return of stamp duty similar to that in Section 23 of 5 and 6 Vict. C. 79.

As to the sum of rupees 200 paid in respect of the former letters of administration, that should, I think, be treated as a payment in part of the *ad valorem* fee payable under the Court Fees' Act, and credit should be allowed for such payment. But both this and the other question submitted by the Administrator General are referred for the final determination of the Honorable the Chief Justice.

Opinion of the Chief Justice:—

I am of opinion that when letters of administration are granted in respect of property which is subject to a mortgage, the value of the property for the purposes of estimating the *ad valorem* duty payable under the Court Fees' Act, 1870, is the value of that with which the Administrator is to deal, *viz.*, the value of the entire property, less the amount of the incumbrance.

On the second question, I think that the Government having received the *ad valorem* duty on a portion of the property under letters of administration which were valid until revoked, such *ad valorem* duty is not payable a second time. I think that the letters of administration to the Administrator General should recite the former grant and the fact of the payment of stamp duty thereon, and that credit should be taken for the payment of rupees 200 *ad valorem* duty on the former letters in determining the stamp to be affixed to those now granted.

The 13th September 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent suit—Gomashta—Section 13, Act VIII (B. C.) 1869.

In the matter of

Ram Lall Kurfurma (Plaintiff) *Petitioner,*

versus

Ram Tarun Koondoo (Defendant) *Opposite Party.*

Baboo Annund Chunder Ghosaul for Petitioner.

No one for Opposite Party.

A Gomashta holding a written authority from his employer and suing for rent in the name and on behalf of the latter, should be admitted as the recognized agent of such employer within the meaning of Section 13, Act VIII (B. C.) 1869.

THIS is an application on the part of Ram Lall Kurfurma, a Gomashta, who states that he brought a suit for rent on behalf of his employer and that both the Courts below have declined jurisdiction on the ground that the suit must be brought, not in the name of the Gomashta, but in the name of the employer. Under Section 32 of the new Rent Act, Act VIII of 1869, every Naib or Gomashta specially authorized shall, for the purposes of all suits for any of the causes of action mentioned in Sections 27, 28, 29 and 30 of this Act, be admitted as the recognized agent of such employer within the meaning of Section 13 Act VIII of 1869. Now this being a suit for rent, it fell under Section 29 and therefore Section 32 is applicable. It has been held that no agent can act unless he holds a written authority from the hands of his employer. In this case the Gomashta does hold authority. It has also been held that a Gomashta cannot one

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in his own name but must sue in the name of his employer. On turning to the copy of the plaint which has been read to us, we find that the Gomashta did sue in the name and on behalf of his employer.

We therefore think that both the Courts were wrong in declining jurisdiction, and we direct them to try the case.

The 13th September 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Transfer under Act III (B. C.) 1870—Re-hearing—Jurisdiction — Section 58 Act X. 1859.

In the matter of

Wooma Churn Moojoomdar, *Petitioner,*

versus

Chunder Kant Roy Chowdhry, *Opposite Party.*

Baboo Anund Chunder Ghossal for Petitioner.

Baboos Rash Beharee Ghose and *Bhowanee Churn Dutt* for Opposite Party.

Where a suit in which a decree has been passed by a Deputy Collector is transferred to a Moonsiff's Court under Act III (B. C.) 1870, an application for re-hearing under Section 58 Act X of 1859 can only be heard by the Moonsiff.

Macpherson and Ainslie, J. J., passed the following order on the 31st July 1871.

Macpherson, J.—The petition may have a rule calling upon that opposite party to show cause within eight days after the service of the rule why the order of the Collector, dated the 9th of May last, should not be set aside on the ground that it was made without jurisdiction.

The reason why we think that the petitioner is entitled to the rule is that it appears to us that the whole of the proceedings both before the Collector and the Deputy Collector were without jurisdiction.

On the 7th May 1870, a decree for rent was passed against the petitioner in the Court of the Deputy Collector. Before any execution had been taken out under that decree, Act III of 1870, B. C., came into force; and under Section 2 of that Act the suit was transferred to the Moonsiff's Court. Subsequently, the Moonsiff made an order for the issue of execution, and thereupon the present petitioner appeared in the Moonsiff's Court, and stating that he wished to apply under Section 58 of Act X of 1859 to have the case re-heard on the ground that the decree of the 7th May had been obtained against him *ex parte* without his having had any notice that a suit was instituted against him,—he prayed the Moonsiff to send the record back to the Deputy Collector in order that an application might be made to the Deputy Collector for a re-hearing. The Moonsiff declined to send the record back to the Deputy Collector, but at the same time apparently expressed an opinion that it was not in the Moonsiff's Court, but in the Deputy Collector's Court alone, that the application under Section 58 could be entertained. An application was subsequently made to the Deputy Collector who sent for the record from the Court of the Moonsiff, and, on the 22nd of December 1870, ordered that there should be a fresh trial. On the 27th of February 1871, he re-heard the case and decided it in favor of the defendant (the present petitioner.)

On appeal to the Collector, the Collector held that the Deputy Collector had no power to set aside the order.

It appears to us to be clear that the Deputy Collector had no jurisdiction in the matter, and that under Act III of 1870, B. C., it was by the Moonsiff, and by the Moonsiff alone, that the application for the re-hearing of the case under Section 58 Act X of 1859 could be heard. We think the whole of the proceedings of the Deputy Collector are irregular and without jurisdiction. But the fact that the Deputy Collector was acting without jurisdiction does not give the Collector jurisdiction in the matter. The Deputy Collector's proceedings were wholly irregular: but so far as we know, no provision is made for any appeal to the Collector in such cases, and the proper remedy would have been by an application to this Court. In strictness, therefore, we think the petitioner is entitled to a rule (if it be worth his while to issue it) calling upon the opposite party to show cause why the Collector's order should not be set aside.

Final Order.

Jackson, J.—We do not consider it necessary to quash the order of the Collector by

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which the original order of the Deputy Collector was set aside, but we add to it the direction that the application made by the defendant to the Deputy Collector for a new trial be transferred to the Court of the Moonsiff, who will consider the propriety of granting such application. We do not allow any costs.

The 14th September 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Cross-decrees—Execution—Mesne profits.

Case No. 216 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 11*th April* 1871, *affirming an order of the Moonsiff of Naraingunge, dated the* 28*th November* 1870.

Anund Mohun Hajrah and others (Decree-holders) *Appellants,*

versus

Shibo Soonduree Dabee and others (Judgment-debtors) *Respondents.*

Baboo Nullit Chunder Sein for Appellants.

Baboos Kashee Kant Sein and *Raebutty Churn Banerjee* for Respondents.

Where there are cross-decrees for possession and mesne profits in respect to the same land, the earlier decree comprehending only a part of the lands embraced in the later, each party may take execution and be entitled to receive wassilat separately.

Glover, J.—THE Judge's order in this case is by no means intelligible, and we have had some difficulty in arriving at the point in issue between the parties. It appears, however, that the decree-holders, appellants in this case, whom we may call the Hazrahs, brought a suit against the Thakoors in 1861 for possession of 180 beegahs of land in rectification of a certain Thâk measurement. They got a decree in 1862 for possession and mesne profits, and this decision after appeal to the Judge was finally confirmed by the High Court. In 1865, the defendants, the Thakoors, sued the Hazrahs for possession and mesne profits of a 6 annas 5 gundahs share of 350 beegahs and got a decree in 1866, and this decree was likewise confirmed by the High Court. Both decree-holders took out execution. The Hazrahs, after getting possession of the land decreed to them, applied for mesne profits, on which an Ameen was deputed to the spot and the Moonsiff decided that the Hazrahs were not entitled to get mesne profits. They then appealed to the Judge who remanded the case to the Moonsiff; and the latter held a further enquiry, the result of which was that he considered the Hazrahs entitled to 2 rupees 3 annas. An appeal was again made to the Judge who has decided that the land for which the Hazrahs and the Thakoors got each a decree being identical, that the last decree, namely, that which was obtained by the Thakoors is to be considered as the one in force as prevailing against the older one. The Judge admits that the case is a hard one, but he does not see his way to grant the relief requested. He says:—"The Thakoors "having succeeded in obtaining a decree "against the Hazrahs for a share of the "land as pertaining to their talook, I am "afraid that the Hazrahs cannot make the "Thakoors pay wassilat on the strength of "a former decree."

As we said before, it is not very easy to understand what the Judge's meaning is. In the first place, we have been told, and the allegation has been supported by a decree of this Court in a regular appeal, that the lands are not identical; but even if they were identical, it is clear, according to the Judge's own statement, that they could only have been identical in part, and the Thakoor's decree of 1865, even if entitled to take precedence on that of the Hazrahs, could only have comprehended a part of the lands decreed to the Hazrahs, so that in any case when the Thakoors' decree for possession and wassilat was satisfied, there was no reason why the Hazrahs should not in their turn get wassilat upon what remained after the Thakoors had received all they were entitled to under their decree. There can be no reason why each party should not take execution of his decree and be entitled to receive wassilat separately.

The case must, therefore, go back to the Judge to try this point. If the lands are not identical, of course *cadet quæstio;* each party can execute his own decree and obtain wassilat: but if, as it has been stated to us, the Hazrahs are merely making use of this decree to get wassilat on lands that have not been decreed to them, the Judge will take care that they do not succeed, and will pass a proper order in the case. Costs to follow the result.

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The 15th September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Admissions—Written statements—Evidence of defendant.

Case No. 142 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 6th February 1871, *reversing a decision of the Moonsiff of Oolooberiah, dated the 9th December* 1870.

Shaikh Shurfuraz Mollah (Plaintiff) *Appellant,*

versus

Shaikh Dhunoo (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Kalee Mohun Doss* for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

When a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is not entitled to say that the plaintiff has relied on his statement as evidence, and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his own favor.

Unless a defendant has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in his own case.

Ainslie, J.—THIS was a suit for rent for the years 1274, 1275 and 1276. The defendant pleaded payment. The first Court disbelieved the evidence adduced by the defendant to prove payment, at the same time rejecting certain accounts put in by the plaintiff with the view to contradict the evidence on the other side. The second Court concurred in rejecting the plaintiff's accounts, but differed with respect to the evidence tendered by the defendant, and was of opinion that the defendant had sufficiently established the fact of payment.

In special appeal it is contended, first, that the Judge was wrong in supposing that the defendant had, as a witness, pledged his oath in support of the papers put forward by him, and it is admitted that the defendant was never examined in Court. The special appellant, therefore, contends that the written statement of the defendant cannot be used in any way as proof of the dakhilahs; and in support of this cites a judgment of Mr. Justice Macpherson reported in Volume V, Weekly Reporter, page 50, in which we find the following passage: "Further, under no circumstances can a "written statement be read as evidence "against any party to a suit save the person "by whom it is made and those who are "bound by admissions made by him."

It has been somewhat ingeniously urged by the other side that under the authority of cases to be found in Volume IX, Weekly Reporter, pages 130 and 290, and in Volume VII, page 29, the written statement of the defendant in this case may be used as evidence in his favor. These cases establish that where a party uses the written statement of his adversary as evidence in his own favor, he is bound to read the whole of it (though the Court is not bound to believe the whole) and cannot select particular passages and read them without the context. Then it is said that in this case the plaintiff used the evidence afforded by the written statement of the defendant to establish the fact of the tenancy, and this being so, he must go on and allow the whole of that written statement to be read as part of the evidence.

Now, as a matter of fact, we do not think that it can be said in this case that the plaintiff used the written statement of the defendant as evidence at all. There is no doubt that if it had been an *ex-parte* case, he would have had to prove the tenancy; but when the defendant came into Court and stated his case and the points on which he proposed to enter into a contest with the plaintiff, the Court fixed the issues under Section 139 of Act VIII of 1859 and called upon the parties to produce evidence on the points laid down in these issues and on no other points. It seems to us that what really occurs in a case of this kind is that the defendant says to the plaintiff,—I will not call upon you to produce evidence on certain parts of your case. There can be no doubt that in this case, the plaintiff must have had some evidence which he could have adduced to show the tenancy and that he would have produced it if he had been called upon to do so. It was the act of his adversary and of the Court which excluded evidence on his part on this particular point, and it would be most unfair under the circumstances to say that he intentionally and voluntarily

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adopted his adversary's statement as proof of the facts stated in his plaint.

In the cases cited from page 290, Volume IX, and page 29, Volume VII, Weekly Reporter, it will be seen that the plaintiffs had entirely failed to establish the claims set up by them by means of independent evidence, and that they were driven back upon the statements of their adversaries in order to make out any case at all. They had to establish certain points on which they were at issue with the defendants, and when they were obliged to have recourse to their adversaries' statements for their own purposes, they were not allowed to select some parts and exclude others, but were compelled to allow the whole to be read as evidence.

And so it was in the case at page 130, IX Weekly Reporter. Although the parties were not at issue as to the fact of the mortgage being in the name of the plaintiff or of his being in actual possession, they were most distinctly at issue as to the nature of the possession. Plaintiff alleged that it was solely on his own account: the defendants averred that he held for himself and them jointly. The only object of the suit was to determine whether plaintiff held for himself alone or not. In special appeal, an attempt was made to use the defendants' written statements as evidence against them, but it was observed that if put in evidence at all, the admission of possession must be taken in conjunction with the allegation that the mortgage was for the joint benefit of the plaintiff and defendants. In that case, as in this, there were certain facts admitted by the defendants; it was not said that they were entitled to read their own statements as evidence in their own favor, because they had made those admissions and had raised no dispute as to certain parts of the plaintiff's case; but that directly the plaintiff tried to use any part of those statements as evidence on the points on which the parties were at issue, the defendants would become entitled to read the whole of them.

At the close of that judgment, a case was put as an illustration by the learned Chief Justice Sir Barnes Peacock, on which the respondent strongly relies. That case, however, on examination does not really support his contention.

It appears to us that on the statement of facts there given, no issue arises as to the actual delivery of the goods sold, but that the real issue is whether the delivery was on credit or not, and that it is for the plaintiff to establish the existence of a debt before he can call on the defendant to prove payment. If the plaintiff fails to adduce independent evidence and attempts to rely on the defendant's statement as an admission, certainly he must take the whole of it together, and equally certainly his suit must fail, for the defendant asserts a readymoney purchase; but the defendant does not get the benefit of his own statement merely because he admits delivery of the goods, but because the plaintiff, being at issue with him on a certain point, fails to prove that point by other evidence and attempts to use part of his adversary's statement as evidence, and so admits it in its entirety.

To accept the argument of the respondent's pleader in this case, we must ignore altogether the nature of the proceedings in our Courts under Act VIII of 1859. Under that Act, it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue, to lay down the issues and to receive and consider the evidence adduced on the points in dispute, but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted; and therefore to lay down that when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his own favor, is a proposition which cannot be maintained. If a party wishes to give evidence in his own favor, of course it is in his power to come forward like any other witness and subject himself to examination and cross-examination in open Court; but until he has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in support of his own case, unless the right, so to use it, has accrued from the deliberate act of his adversary. A party cannot himself determine that his own statement shall be used as evidence in his favor. We think that the special appellant is right in contending that in this case the written statement of the defendant is in no sense evidence.

This brings us to the question whether there is any other and sufficient evidence to

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support the finding of the Lower Appellate Court. In the 3rd ground of appeal, it is said that "the utmost that the defendant's "witnesses speak to is that there was an "adjustment of accounts in Chyet 1276, and "furkhuttees granted. This does not at "all prove the payment of rent for the "years 1273, 1274, 1275, or even that of "1276." Now we think that where a witness speaks to an adjustment of accounts between the plaintiff and defendant as having taken place in his presence and to the grant of furkhuttees by the plaintiff to the defendant for a given year, the onus of proof is on the plaintiff to show that there were any balances due on account of the previous years. In this case, the evidence that has been adduced by the plaintiff has been entirely disbelieved. The Judge has declined to give any credit to the witnesses examined by the plaintiff, and both Courts concurrently have found that the papers put in by him have been tampered with, so that there is really nothing to contradict the evidence of the defendant, such as it is, and nothing to rebut the presumption, which arises in his favor from the settlement of accounts and grant of a furkhuttee in the year 1276, that all previous rents had been duly paid up. We cannot go into the grounds upon which the lower Courts have rejected the jumma-wassil-bakee papers put forward by the plaintiff. They have given their reasons for rejecting these papers, and the reasons which they have assigned, if founded on facts, are certainly good reasons. It is impossible for us to say that there was no foundation for them, and therefore we cannot interfere with this part of the case, which is a finding of fact.

It is unnecessary for us to go into the last ground of appeal, because we are not founding this judgment in any way upon the receipts for the years 1274 and 1275, but on the sufficiency of the oral evidence which is given to prove payment and settlement of accounts in the year 1276.

The appeal is dismissed with costs.

The 18th September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Stamp fees — Article 3 Section 17 Court Fees' Act.

Case No. 123 of 1871.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Hooghly, dated the 27th March 1871.

Mokhoda Dossee (Plaintiff) *Appellant,*

versus

Nobin Chunder Mitter (Defendant) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Where plaintiff sued to establish her right as the heir of her deceased son and to set aside a certificate under Act XXVII of 1860 granted jointly to her as well as to the defendant, with a view to being permitted to draw interest on Government Promissory Notes belonging to the estate of the deceased:

HELD that as consequential relief was to follow the declaratory decree sought, the stamp fee of rupees 10 prescribed by Article 3 Section 17 Schedule II Court Fees' Act was not sufficient for the plaint.

Kemp, J.—THIS suit turns upon the question whether the order of the Court below rejecting the plaintiff's claim is correct or not. The suit was under Section 15 of Act VIII of 1859, to establish that the plaintiff is the heiress of her son, the late Sita Nath, and also to establish that she, as such heiress, is entitled alone to draw out the interest due upon 9,600 rupees invested in Government securities appertaining to the estate of her deceased son. The plaint sets forth that the brother of the plaintiff's husband has fraudulently obtained a certificate under Act XXVII of 1860 from the Judge's Court of Cawupore jointly with the plaintiff, and that thereby the defendant has become authorized under that certificate to draw the interest due on the aforesaid promissory notes, and in consequence of that the plaintiff has not

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been able to draw interest on the said notes alone. The prayer of the plaint is that the plaintiff be declared to be the heiress of her deceased son, and as such be entitled to draw the interest of the promissory notes belonging to the estate of her deceased son, solely, and not in conjunction with the brother of her husband.

The Officiating Subordinate Judge says that this is a suit under Section 15 of Act VIII of 1859 to establish the plaintiff's right under the Hindoo law as the legal heir of her deceased son and to cancel the summary decision or order granting a certificate jointly to her as well as to the defendant, and that she alone should be permitted to draw interest due on Government papers belonging to the estate of the deceased. It is evident, therefore, observes the Officiating Subordinate Judge, that the plaintiff not only prays for a declaratory decree being passed in her favor, but also seeks for a relief which will result from the decree setting aside the certificate jointly held by her and the defendant. As she wants to draw interest on Government papers appertaining to her son's estate, she directly applies for a relief which will flow from the decree being passed in her favor. In that view of the case, the Subordinate Judge held that a 10 rupees stamp was not sufficient and that the plaintiff must be called on to pay the balance of the stamp fee within seven days and the case was postponed to the 25th of March. On the 27th of March, the plaintiff having declined to pay the additional stamp, the case was struck off.

On appeal, the grounds taken are :—That the Court below is wrong in assuming that the petitioner has prayed for the cancellation of a summary order, whereas the petitioner has not sought for any such remedy; 2nd, that no consequential remedy has been sought for in the plaint, and therefore under the law (Article 3 Section 17 Schedule II of the Court Fees' Act) a stamp fee of rupees 10 only is required. Now it is quite clear that this suit is brought not only to set aside the summary order or decision passed under Act XXVII of 1860, but also to obtain a declaratory decree from which consequential relief is to follow.

We, therefore, think that the Officiating Subordinate Judge was quite right in rejecting the plaint. We affirm his decision and dismiss the appeal with costs.

The 18th September 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Divorce—Option—Non-user—Duty of Courts.

Cases Nos. 126 and 162 of 1871.

Miscellaneous Appeals from an order passed by the Judge of Chittagong, dated the 2nd February 1871.

Meer Ashruf Ali and another (Petitioners) *Appellants,*

versus

Meer Ashad Ali (Objector) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellants.

Mr. J. W. B. Money and *Baboos Kalee Mohun Doss* and *Aukhil Chunder Sein* for Respondent.

Under Mahomedan Law where the husband gives the wife an option as to declaring herself repudiated and she avails herself of it, the repudiation or divorce is binding on him; and a discretion to repudiate when attached to a condition need not be limited to any particular period, but may be absolute as regards time.

Such option is not lost by non-user where there is nothing in the contract between the parties obliging the wife to exercise the option directly a breach of the condition occurs.

Notwithstanding Mahomedan law a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual where such a conclusion would be contrary to the course of nature and impossible.

Glover, J.—Ashruf Ali applied to the Civil Court at Chittagong for certificates under Act XL of 1858 and Act IX of 1861, entitling him to the charge of his minor daughter Zobeida, and to the management of the property devolving on her by the death of her mother Asoofa Khatoon.

The material facts of the case are as follows :—

Ashruf Ali married Asoofa Khatoon in February 1855.

At the time of the marriage, a kabinnamah was executed by Ashruf Ali fixing the dower and covenanting not to marry a second wife and to keep a concubine. If he did either of these things, the wife was to have the power of divorcing herself from him.

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There was some doubt expressed before us as to the meaning of the kabin in this particular, but on turning to the original I find that the proper signification has been given by the Judge to the words. They are "*Shuriah nigah nadârum*," which are rightly paraphrased by the English "will not keep a concubine:" the literal meaning is "will not look upon a concubine."

Asoofa Khatoon many times during her lifetime declared that in consequence of her husband's infidelity with a concubine named Attar Jan, she had availed herself of the privilege granted to her in the kabin, and had divorced her husband.

She divorced him, it is said, for the third time and before witnesses in January 1869.

And there is no doubt that she brought a suit in the Moonsiff's Court in April 1869 to have it declared that in consequence of that divorce she was no longer Ashruf Ali's wife.

This suit was decreed in her favor in September of the same year, the Moonsiff declaring Asoofa Khatoon released from the matrimonial claims and rights of Ashruf Ali.

Whilst this suit was pending, Ashruf Ali seems to have made more than one application to the Magistrate charging Ashad Ali (the objector in these suits) with abduction of and adultery with his (Ashruf's) wife Asoofa Khatoon. These petitions came to nothing.

Ashruf contrived, however, to get an application for review of judgment received by the Moonsiff, and the divorce case was accordingly re-placed on the file. This was in October 1869.

In December of the same year, matters were compromised between the parties. The reasons for this arrangement on the lady's side were probably such as the Judge supposes, but we need not go into them. It is sufficient to say that on the 28th of December, Ashruf Ali, in consideration of getting off payment of dower and of certain landed property given up by Asoofa Khatoon, released her from her marriage agreement, and three days after, *i. e.*, on the 31st, executed a regular tilaknamah, or writing of divorcement, in which he admitted the validity of the Moonsiff' decree and of the divorce pronounced by Asoofa Khatoon in January 1869.

Between seven and eight months after this divorce, Asoofa Khatoon gave birth to a daughter, Zobeidah, and a month or so after that died. The child was born in the house of Ashad Ali, and is there now.

Ashruf Ali claims the guardianship of the child and the management of her property on the ground that he is her father, and therefore the most fit person for the trust.

The objector, Ashad Ali, the husband of Luteefa Khatoon, Asoofa Khatoon's sister, alleges, on the other hand, that he is the father of the child; that after the divorce, he married Asoofa Khatoon having previously divorced his own wife, Luteefa Khatoon.

The Judge decided that the divorce by Asoofa Khatoon of her husband, Ashruf Ali, was provided for by the kabinnamah, and was not contrary to the Mahomedan law. He found also that Asoofa Khatoon had availed herself of the power given her, and had divorced her husband in January 1869, and that Ashruf Ali was not the father of the child. He found also, although that perhaps was not a matter properly under his consideration, that Ashad Ali had not married Asoofa Khatoon.

It is contended before us in appeal:—

(1) That according to Mahomedan law, a wife has no power to divorce a husband.

(2) That the child was born seven months and some days only after the divorce by Ashruf Ali, and that therefore he must be presumed to be the father.

(3) That Ashruf Ali being a minor at the time of his marriage was not bound by the kabinnamah.

(4) That there was no sufficient evidence to prove that Ashruf Ali had no access to his wife from the date of the latter's divorcing him; and lastly, that the Judge misunderstood the Mahomedan law of "Iddut."

The first objection appears altogether untenable. Mahomedan law allows of many kinds of "Iktear," or choice, and recognizes many ways in which a wife may have, as it is technically called, "her business in hand" and declare herself repudiated. The husband may give her an option, and if she avails herself of it the repudiation or divorce is binding on him, and a discretion to repudiate, when attached to a condition, need

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not be limited to any particular period, but may be absolute as regards time.

Now, in the present case, the execution of the kabinnamah is admitted, and there can be no doubt that it gave Asoofa Khatoon the option of repudiation should Ashruf Ali either marry a second wife or keep a concubine. It is not denied that Ashruf Ali did keep a woman named Attar Jan in his house, and had a child by her; but Mr. Gregory for the appellant argues that the option, if there were one, ought to have been exercised at once, and that it was lost by non-user. There is nothing in the wording of the kabin, that limits the wife to any particular time, and where words are general we have no right to limit their application. There was nothing in the contract between Ashruf Ali and Asoofa Khatoon which obliged the latter to exercise her option directly the breach occurred.

The second objection depends on a question of time. If the divorce between Ashruf Ali and Asoofa Khatoon is to date from the registered writing of divorcement given by Ashruf Ali on the 31st of December 1869, then of course there would be nothing against the *primâ facie* assumption that a child born between 7 and 8 months after was his child; but this begs the entire question. The case for the objector is that Asoofa Khatoon divorced her husband in January 1869, and had had no intercourse with him for long before that. The Judge finds on the evidence that the repudiation by the wife did take place at the time stated, and I concur with him in his estimate of the evidence.

Moreover, in the solehnamah executed by the parties, and afterwards in the bill of divorcement given by Ashruf Ali, the latter expressly ratifies all former proceedings. In the compromise he says, I acquiesce in the decree of divorce (the Moonsiff's) and in your (*i. e.* Asoofa's) original Tilâk or divorce. And in the Tilaknamah, he again says that he acquiesces in the Moonsiff's decree of September 1869, which releases the lady *a vinculo matrimonii* on the ground that she had exercised her legal right under the kabin.

There seems to be no doubt, therefore, that the divorce operated from January 1869, and that the argument derived from the fact of the child's birth having taken place within 8 months after the registered bill of divorcement, fails.

But it has been argued, and this involves the consideration of the last ground of appeal which, for convenience sake, I may as well take up in this place, that according to Mahomedan Law a child born of a woman within two years of her divorce from her husband is to be considered the child of that husband.

The Judge disposes of this difficulty by holding that the doctrine referred to is not a rule of Mahomedan Law, but a presumption or rule of evidence only. But he also finds that Asoofa Khatoon made what was equivalent to a declaration that her "Iddat" (period of waiting) was accomplished before the Magistrate and that as the child was not born till more than 6 months after that declaration the paternity of Ashruf Ali was not established.

With regard to the first point, I am not prepared to say that the Judge is not right. The two years dictum is admittedly founded on report only (Aboo Huneefa heard from Ayesha that Mahomed had said that a child is never more than 2 years in the womb), and its application is only sanctioned because of the possibility of a doubt. Thus in the Hedaya, Volume I, Book IV, Chapter XIII, we find that when a woman is delivered of a child within less than two years from the time of divorce, the parentage of the child is established in the husband, because it is as possible that conception may have taken place previous to divorce as it is that it may have taken place after divorce,—but yet "reversal" is not established, because as it is possible that conception took place after divorce, so is it also possible that it took place before divorce, and therefore a doubt exists on this point.

The Mahomedan Law is full of contrivances of all kinds whereby to avoid the bastardizing of offspring, and this is one of them. For my own part however, and keeping in view the principles of equity and good conscience on which, in the absence of express provision of Law, Courts in India are bound to act, I do not see how, the Mahomedan rule notwithstanding, I could pronounce a child to be the legitimate offspring of any particular individual where such a conclusion would be contrary to the course of nature and impossible. The utmost I could say is that under such circumstances, and no one opposing, I would presume legitimacy on the ground that Mahomedan custom presumes it; but the presumption would be always rebuttable by

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any one who chose to take the trouble to appear and rebut it.

In page 380, Volume I, of the Hedaya it is laid down that where a woman who has made a declaration that her "Iddut" is accomplished, bears a child after six months from the date of her declaration, parentage is not established, because it is possible that her pregnancy may have occurred after that. Now there is no direct evidence of Asoofa Khatoon's having made this declaration, her petition of the 17th February 1869 in which the fact is set forth having been rejected by the Judge; but I am disposed to concur with him in thinking that her deposition before the Magistrate "contains matter enough to amount to such a declaration," in which case the parentage of Ashruf Ali in the child born more than a year afterwards would not be established, and we need not trouble ourselves with the two years rule at all.

As to the objection that Ashruf Ali was a minor at the time of the marriage, it is by no means clear that he was a minor at that time. In any case the contract made for him would only be voidable, not void, and there is no contention that he even after coming of age took no steps to void it. This objection therefore fails.

There is sufficient evidence, I think, to show that Ashruf Ali had no access to his wife at least from the date of her repudiation of him in January 1869, and the probabilities are altogether in her favor. It is clear that the two were on very bad terms, and the various counter petitions made to the Magistrate show a state of things quite incompatible with the fact of their living together as man and wife. I see no reason to doubt the correctness of the Judge's decision on this point.

On the whole, therefore, I am of opinion that Ashruf Ali has not established his right to have the guardianship of the child Zobeidah's person or the management of her property. It is not necessary to go further than this in the present suit, or to consider whether Ashud Ali in his turn is a fit person to undertake the charge. That can be decided when Ashud Ali applies for a certificate, or if the Civil Court thinks proper to move in the matter for the purpose of having a curator and guardian of its own appointed.

This appeal must, I think, be dismissed with costs.

Mitter, J.—I am of the same opinion. The appellant has failed to satisfy me that he is the father of the child whose guardian he seeks to be. The evidence on this point appears to me too strong to be resisted. Without however pronouncing any opinion on the legitimacy of the child, it is sufficient for me to say that the appellant has not succeeded in showing that he is entitled to obtain the relief prayed for by him.

The 19th September 1871.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp *Judges.*

Section 12 Act XL. 1858—Section 7 Act IX. 1861—Collector's jurisdiction—Civil Courts.

Case No. 249 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rajshahye, dated the 11th August 1871.

Rajah Mohessur Roy (Plaintiff) *Appellant,*

versus

The Collector of Rajshahye (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where application is made under Act IX of 1861 and an estate is taken charge of by the Collector under Section 12 Act XL of 1858, the interference of the Civil Court is precluded alike by the former Act (Section 7) and by the latter.

Kemp, J.—THE present appellant, Rajah Mohessur Roy, is the father of four sons,—two majors and two minors of tender age. It appears that the major sons took proceedings under Act XXXV of 1858—the Lunacy Act—and in consideration of those proceedings being withdrawn, an ikrar was executed by Rajah Mohessur Roy and an application made to the Civil Court to place his estates under the control of the Collector under the provisions of Section 12 Act XL of 1858. The Collector, for reasons which are not before the Court, has thought it proper to prevent the minor sons from associating with Grish Chunder Lahiree alleged to be a relation of the appellant, but there is nothing before the Court to shew that the Collector has prohibited the appellant from residing

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with his children in such house as the Collector may think fit to appoint.

The present application to the Civil Court has been made under Act IX of 1861, as is clear from the statement of the applicant himself and is also admitted by his pleader, Sreenath Doss. The application, therefore, having been made under the provisions of Act IX of 1861 and the estate having been taken charge of by the Collector under the provisions of Section 12 Act XL of 1858, Section 7 of the former Act precludes all interference with the jurisdiction of the Collector exercised under the later Act. Therefore, on this ground alone, the application of the Rajah ought to have been rejected, inasmuch as under Act IX of 1861 the Civil Court had no jurisdiction, but the Judge has gone further and he states that under the provisions of Act XL of 1858 the Civil Court has no jurisdiction to interfere in the matter.

We think that the Judge's decision is right. On the application of Rajah Mohesur Roy, the estate of the minors was placed by order of the Civil Court in charge of the Collector. Under Section 12 of that Act, the Collector shall appoint a manager of the property of the minor and a guardian of his person in the same manner and subject to the same rules in respect of such appointments and of the duties to be performed by the manager and the guardian respectively, so far as the same may be applicable, as if the property and person of the minor were subject to the jurisdiction of the Court of Wards. Section 15 enacts that the proceedings of the Collector in the charge of estates under that Act shall be subject to the control of the superior revenue authorities. Section 25 states that every guardian appointed by the Civil Court or by the Collector under that Act who shall have charge of any male minor shall be bound to provide for his education in a suitable manner, and that the general superintendence and control of the education of all such minors shall be vested in the Civil Court or in the Collector, as the case may be. As the Collector in this case took charge of the minors under the provisions of Section 12, therefore the general superintendence vested in him. We, therefore, think that the Judge's order in this case was right on both the grounds, *viz.*, that he had no jurisdiction under Act IX of 1861 and that he might have stopped there and thrown the case out on that ground, but that having gone further and held that he had no jurisdiction under Act XL of 1858, he is also right on that point.

The appeal is dismissed with costs.

The 20th September 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Res judicata—Section 2 Act VIII of 185—Claims of different natures.

Case No. 647 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 16*th March* 1871, *reversing a decision of the Moonsiff of Gowhatty, dated the* 9*th September* 1870.

Gooroo Dutt and others (some of the Plaintiffs) *Appellants,*

versus

Sooroo and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

No one for Respondents.

A suit for possession as the heir of S is not barred by Section 2 Act VIII of 1859, because plaintiff's former claim to the same property as the heir of S's father was dismissed.

Ainslie, J.—THE plaintiff in this case sued to recover certain property as one of the heirs of one Shome Dutt.

The defendant contended that he was the adopted son of Shome Dutt, and the plaintiff therefore had no title, and further that the plaintiff formerly brought another suit to recover this very property which was dismissed, and therefore the present suit is barred under Section 2 Act VIII of 1859.

The Lower Appellate Court has held this plea in bar to be good.

We are of opinion that this judgment must be set aside. It is quite clear that although the property may be the same the nature of the claim is entirely different, and that although the plaintiff may have had no right to take a share in the property of Kamar as one of that person's heirs because Kamar left a son who would take the whole property, still he may have every right to come in after the decease of that son and claim as one of his heirs.

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The case must, therefore, go back to the Deputy Commissioner in order that he may try the other question, *viz.*, whether the adoption of the defendant has been established by evidence.

The costs will follow the result.

The 14th August 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint Hindoo family—Rights of members—Settlement.

Case No. 39 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 31*st October* 1870, *reversing a decision of the Moonsiff of Pauchpookhuriah, dated the* 31*st December* 1869.

Huro Soonduree Debia (Plaintiff) *Appellant,*

versus

Doorga Doss Bhuttacharjee (Defendant) *Respondent.*

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Appellant.

Baboos Kalee Mohun Doss and *Rash Beharee Ghose* for Respondent.

The fact of a settlement being made with one member of a joint Hindoo family does not negative the rights of other members to a participation in the property so settled; nor is it necessary for such other members, if living in commensality with the former as joint proprietors, to prove that they actually contributed money towards the acquisition of the property.

Mookerjee, J.—It appears that 4 annas of the talook in suit was the property of two brothers, Gooroo Doss and Kalee Doss; that Kalee Doss died leaving his widow, Ruttun Mallah, and that Gooroo Doss and Ruttun Mallah held a four annas share of this talook till the year 1863, when the rights of Gooroo Doss were sold in execution of a decree by the Civil Court. The defendant was the purchaser at this sale. Three years later, on the 12th June 1866, the rights of Ruttun Mallah were sold and the plaintiff became the purchaser at this sale. The plaintiff not having been allowed to obtain possession of the share of Ruttun Mallah, has instituted this suit against the defendant, the purchaser of the rights of Gooroo Doss.

The defence raised is that Gooroo Doss was the sole proprietor of the 4 annas share of this talook, and that Ruttun Mallah had no right or interest which the plaintiff could purchase in 1866.

The first Court has gone very carefully into the facts of this case and has given a decree in favor of the plaintiff. It finds that both Gooroo Doss and Ruttun Mallah were the proprietors of the 4 annas previous to the purchase by Government of the zemindaree of Burodakhad; that Government after its purchase in 1850 made over this talook to the four head male members of the four different shares in it; that although the settlement was in the name of Gooroo Doss alone as regards the 4 annas of this talook in suit, Ruttun Mallah was allowed by Gooroo Doss to remain in possession of her 2 annas share as before; that the tenants on this property distinctly proved her possession down to the date when her rights and interests were purchased by the plaintiff; that the co-sharers of this talook have also deposed to the fact of Ruttun Mallah's right and possession; and that Gooroo Doss himself examined in this case distinctly admitted both these points. The first Court also refers to the thak proceedings held in 1861, in which Gooroo Doss against his own interest admitted Ruttun Mallah to be the proprietor in possession of the two annas of this talook. The first Court gave a decree to the plaintiff for one anna which is the subject of this suit.

On appeal to the Subordinate Judge, Mr. Hutchinson has reversed this careful decision of the Moonsiff, as it appears to us on the simple ground that the settlement which the Government made in 1850 being in the name of Gooroo Doss alone, Ruttun Mallah can have no rights whatever. The Subordinate Judge admits that the kabooleuts filed by the plaintiff showed the name of Ruttun Mallah, and that the thakmap also shewed that she was the proprietor and in possession of the property. But he says "that all these are "not *primâ facie* sufficient guarantee that "Ruttun Mallah was the proprietor of half "of 4 annas of the talook." The Subordi-

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nate Judge does not find that Ruttun Mallah was not in possession, that these kabooleuts were false, or that the evidence of the witnesses brought forward by the plaintiff was not worthy of credit: he does not hold that Gooroo Doss's statement was collusive, or that the co-sharer's deposition to the fact of Ruttun Mallah's right and possession was not worthy of belief. But the simple fact of the settlement of 1850 standing in the name of Gooroo Doss alone, Kalee Doss having died long before, was, according to the judgment of the Subordinate Judge, quite sufficient to override the mass of evidence on which the first Court had found that Ruttun Mallah's right and possession were proved.

The Subordinate Judge further remarks that Ruttun Mallah could become owner only by inheritance on the death of her husband Kalee Doss, who, it is said, died long before. But the question before him was not a question of inheritance. The question was whether Gooroo Doss, having obtained the settlement from Government in recognition of the old rights of his family to this property, had or had not admitted Ruttun Mallah, his brother's widow, to participate in the settlement, and had allowed her to remain in possession as the proprietor of a moiety of the 4 annas. This issue, which was found in favor of the plaintiff by the Court below, was not at all disturbed by the Subordinate Judge. But he seems to think that because the settlement was in Gooroo Doss's name, Ruttun Mallah could not possibly have any right or interest in this property after 1850, forgetting that in a joint Hindoo family mere name is next to nothing.

The Subordinate Judge also seems to admit that Ruttun Mallah was living in the same mess and in the same house as a joint proprietor or sharer with Gooroo Doss. But he expects that the plaintiff should have proved that Ruttun Mallah had actually contributed money towards the acquisition of this property. The whole decision shows that the Subordinate Judge has not understood the case set up by the parties; that there is a total failure and miscarriage of justice, and that the object and the scope of the suit has been wholly misconceived by him. We, therefore, set aside the decision of the Subordinate Judge and restore and affirm the decision passed by the first Court. The appellant will have his costs in this Court and in the Lower Appellate Court.

The 16th August 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution — Limitation—Proceedings keeping a decree alive—Costs.

Case No. 188 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 25th March 1871, *affirming an order of the Moonsiff of that District, dated the 16th January* 1871.

Shaikh Mahomed Busseeroollah Chowdhry (one of the Objectors) *Appellant,*

versus

Ram Kant Chowdhry (Decree-holder) *Respondent.*

Baboo Aukhil Chunder Sein for Appellant.

Mr. R. E. Twidale for Respondent.

Where the original suit is pending in appeal, the decree-holder is not obliged to execute his decree for costs until the proceedings are set at rest by the Appellate Court; and if application is made for a reveiw of the order made in appeal, an attempt made to support the original order must be regarded as proceedings to keep it alive.

Semble, when an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.

Mookerjee, J.—We do not think it necessary to call upon the respondent in this case. Two points are urged in this appeal: first, that the decree which is sought to be executed by the respondent being of date the 13th January 1863, is barred by limitation.

With reference to this objection, it appears that the order dated the 13th January 1863 was passed by the Lower Appellate Court when it remanded the case to the Court of first instance for further enquiry.

That enquiry was completed by the first Court on the 5th April 1865, and there was an appeal from the order to the Judge, and a further appeal to the High Court, which was not disposed of till May 1865.

On 25th March 1866, the present petitioner applied for a review of the order of the 13th January 1863 to the Additional Judge who passed the order. The respondent was then supporting the order of the 13th January 1863, and in accordance with

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the Full Bench decision was attempting to keep the decree alive.

The order rejecting the application for review was again appealed by the petitioner to the High Court ; and it appears that the proceedings did not terminate till March 1868.

The present application for execution is dated August 1868. The objection of the petitioner is that, inasmuch as the original order for costs is dated the 13th January 1863, and execution has not been sought within three years from that order, the decree is dead.

We are of opinion that, inasmuch as the original suit was pending in appeal up to May 1865, the respondent was not obliged to execute this decree for costs until the proceedings were all set at rest by the highest Court, which was only done in 1865. The respondent would have been obliged to execute this decree within three years from this date. But inasmuch as the appellant applied for a review of that order, and those proceedings continued till 1868, the attempt of the respondent to support the order of the 13th January 1863 must be considered, according to the determination of the Full Bench, to be proceedings taken to keep alive the order which is now sought to be executed. The application seems therefore to us to be within time and is not barred.

The next objection taken is that, inasmuch as the order of 13th January 1863 merely allowed one-fourth of the costs of the appeal, the respondent was wrong in asking costs of the Appellate Court as well as of the Court below to be awarded to him

It appears from the Judge's decision that there was a decree drawn up in 1863 with this item, *viz.*, the item of costs in the lower Court was an item in the decree. The Judge was right in saying that, as it was an item in the decree, he had no power to alter it.

The appellant contends that it was not an item in the decree. But he has not produced the decree ; and he has not shown to us that the decree merely contains one-fourth of the costs of the Appellate Court and not of the first Court, as it is said that it does. Besides he has not shown any reason why the costs of the first Court should not be included in the decree, when the Appellate Court has decreed the appeal and has given costs of its own Court. The pleader for the appellant has no special instruction or any paper by which he is warranted in saying that the decree does not contain the item. The order merely is shown to us. But the Judge does not speak of the *order* but he speaks of the *decree*, and inasmuch as we are satisfied that the decree did contain this item, we would not be warranted in setting aside the order passed by the Judge. Under these circumstances, we are of opinion that there is no reason for interfering with the order passed by the Judge.

We therefore dismiss this appeal with costs, two gold mohurs being allowed for pleader's fees.

The 16th August 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution proceedings—Irregularity—Limitation.

Case No. 167 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 25th March 1871, *affirming an order of the Moonsiff of Sonamgunge, dated the 25th June* 1870.

Pran Kishore Deb (Decree-holder) *Appellant,*

versus

Kishen Chunder Chowdhry and others (Judgment-debtors) *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

No one for Respondents.

Proceedings in execution, taken out *bonâ fide* and with the permission of the Court, even though irregular *e. g.* execution of a part only of a joint-decree) are sufficient to keep the decree in force.

Jackson, J.—We do not concur with the Judge in the view of the law taken by him. It appears there was originally one decree-holder, whose rights have now devolved partly by sale and partly by will upon three persons. The present three decree-holders holds respectively 2 annas, 5 annas and 1 anna of the decree. They jointly preferred an application for execution of this decree on the 22nd February 1870. The decree

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was passed on the 18th December 1860. For some years after 1860, either the three jointly or two of them jointly in the absence of the third, have been from time to time executing portions of the decree which affect them respectively. In 1866, the three decree-holders were at the same time executing the decree, though the execution proceedings originate in separate applications, one by one of the decree-holders, and the other by the remaining two. The execution record of both remained the same, though separate Ameens were apparently sent to make enquiries. At that time the judgment-debtors paid in a large sum of money in liquidation of the decree and to prevent the sale of property which had been attached. These proceedings came to an end in 1867.

Subsequently in 1868 two of the decree-holders took out further execution. and these proceedings went on through 1869, and were finally struck off the file by the Moonsiff, on the ground that under a recent ruling of the High Court it was irregular to carry on execution of only a part of the decree.

The Judge on appeal has evidently with some mistrust or hesitation come to the conclusion that all these proceedings in 1866, in 1867, in 1868, and in 1869, were, according to the recent decision on the point, irregular, and therefore they could not be taken into consideration in computing the period of limitation. He admits that all these proceedings were in the highest degree *bonâ fide*: Ameens were deputed on each occasion to make enquiries, possession was given of a portion of the property, wassilat was being ascertained, and even the judgment-debtor paid in a large sum of money. It certainly seems somewhat startling that all such proceedings should not be held—proceedings which would prevent the bar of limitation. It may be that the Court was wrong to allow those proceedings to take place: it may be that the Moonsiff ought, when two of the decree-holders applied separately for execution of their shares of the decree, to have rejected their applications, and to have informed them that execution could not be taken out unless they all three joined. But it does not follow that, because they were allowed irregularly to take out such execution, all such proceedings are to be held no proceedings at all.

The point has lately been raised before another Division Bench of this Court whose decision will be found in XV Weekly Reporter, page 449. It was there held that such proceedings, though irregular, were *bonâ fide* proceedings in execution of decree, and were sufficient to keep the decree in force. We concur with those learned Judges, and we think that it would be most inequitable to hold the present decree-holder barred by limitation from further execution of the decree, because certain former proceedings were by the permission of the Court allowed to be conducted in some irregular manner.

Whether we look to the proceedings of 1866 or 1867, or to the proceedings of 1868 and 1869, we think that both series of proceedings were sufficient to prevent the bar of limitation.

We set aside the decision of the Judge and remand the case to the lower Court for execution.

Appellants will have their costs, pleader's fees in this Court being assessed at two gold mohurs.

The 17th August 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Regulation XXVII of 1793—Hauts—Bazars.

Case No. 551 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 18th March 1871, reversing a decision of the Moonsiff of Ameergunge, dated the 6th July 1870.

Chunder Nath Roy (Plaintiff) *Appellant,*

versus

Moonshee Zemadar (Defendant) *Respondent.*

Baboos Kashee Kant Sein and *Jogendro Nath Bose* for Appellant.

Baboos Kalee Mohun Doss and *Issur Chunder Doss* for Respondent.

Regulation XXVII of 1793 applies only to *hauts* and *bazars* which were in existence when it was enacted, not to those of a later date.

Jackson, J.—THIS case must go back to the Judge. This Bench has already de-

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cided on a former occasion, namely, in the case of Mohinee Mohun Doss against Moonshee Aftabooddeen Ahmed, on the 19th January 1871, that the view of the law which the Judge has here taken is an incorrect view. Regulation XXVII of 1793 applies to *hauts* and *bazars* which were then (*i. e.* in 1793) in existence, and is not applicable to those of the present date.

There is also a decision of another Division Bench of this Court to this effect in XI Weekly Reporter, page 112.

The Judge finds that inasmuch as the contract is in contravention of the law laid down in Regulation XXVII of 1793, the contract is illegal and void. If, however, Regulation XXVII of 1793 does not apply to *bazars* and *hauts*, except to those which were in existence at the time when the law was enacted, it would follow that this bazar, which was not in existence at that time, is not subject to that rule, and that this contract is not in any way illegal.

We reverse the Judge's decision and remand this case to him for trial on the other issues.

Costs to follow the result.

The 17th August 1871.

Present :

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Proceedings after execution.

Case No. 183 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Mymensingh, dated the 25th March 1871 *reversing an order* of the Moonsiff of that District, dated the* 14*th July* 1869.

Juggut Chunder Bhadooree and another (Defendants) *Appellants,*

versus

Shib Chunder Bhadooree (Plaintiff) *Respondent.*

Mr. J. S. Rochfort for Appellants.

Baboo Sreenath Doss for Respondent.

An elephant having been attached in execution, it was released on the claim of one P, upon S standing surety. It was finally declared to be the property of the judgment-debtors; but the decree having been satisfied from other sources, it was ordered that the elephant be returned to the judgment-debtors. It was then demanded from the surety; but he objecting, the claimant (P) was served with notice to produce it. This not having been done within the period fixed, the Moonsiff ordered that it should be demanded from the surety, and (on his failure to produce its stipulated price) should be realized by attachment and sale of his property.

HELD that the decree having been executed, the Moonsiff's subsequent proceedings as to the elephant were illegal and that the right to it was open to a suit.

Jackson, J.—WE think that the whole of the proceedings about this elephant in the Court of the Moonsiff were utterly illegal. The decree in the case had been executed and the Moonsiff ought not to have taken any further proceedings as regards the elephant. The question of the right to it is still open to a suit. If Juggut Chunder Bhadooree and Mohesh Chunder Bhadooree think that they are entitled to obtain this elephant from Shib Chunder, they ought to have brought a suit. The Moonsiff was wrong to pass any order whatever upon their application. The Judge, it appears, has set aside those orders. Whether there was an appeal to him or not, we think that those orders have been properly set aside, and that the parties be referred to a separate suit for the recovery of the elephant.

The special appellant to this Court must pay costs for this appeal, two gold mohurs being allowed for pleader's fees.

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* *Order of the Moonsiff.*

In the execution of a decree, an elephant was attached as the property of the judgment-debtors. An objection was made on behalf of claimant Prosunno Bhadooree to release it from attachment, and Shib Chunder Bhadooree stood a surety to release the elephant to the claimant. Finally the right of the judgment-debtors was declared, and it was held that the elephant should be given to the judgment-debtors. As the decree was satisfied from other sources, it was ordered that the elephant be returned to the judgment-debtors. But at first on a demand of the elephant from the surety, he raised an objection that according to the terms of the zaminnamah (surety-deed) the elephant should have at first been demanded from the claimant, and under the surety-deed No. 31, dated 29th Falgoon 1274, B. S., on the record of the execution proceedings No. 589 of 1868, the claimant was ordered and served with a notice to produce the elephant, but the claimant does not produce the elephant within the period fixed, this being the last day. It therefore seems proper that in lieu of the elephant, rupees 3,000, its stipulated price in the surety-deed, be demanded from the surety, and on his failure the money be realized by attachment and sale of the real and personal property of the surety. His objection that he and the other judgment-debtor have shares in the elephant cannot now be heard. Here it is sufficient to bind him according to the terms of the surety-deed executed by him. Therefore, it is ordered that Shib Chunder Bhadooree, surety, opposite party, should produce rupees 3,000, the amount secured, or else it be realized by attachment and sale of his moveable and immoveable properties.

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The 17th August 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Possessory suit—Limitation—Cause of action.

Case No. 525 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 6th February 1871, *affirming a decision of the Moonsiff of Noornuggur, dated the 9th February* 1870.

Kabul Krishna Doss (Plaintiff) *Appellant,*

versus

Mohessuree Debia and others (Defendants) *Respondents.*

Baboo Aukhil Chunder Sein for Appellant.

Baboo Nullit Chunder Sein for Respondents.

In a suit to recover possession of lands which had been sold to plaintiff, but which had been subsequently taken back by one of the vendors under an agreement that he would make over other land in exchange,—plaintiff's ground being that he had been dispossessed of those other lands which were eventually decreed to another party:

HELD that plaintiff's cause of action originated on the date of the decree depriving him of the lands last mentioned.

Jackson, J.—THE plaintiff brought this suit to recover possession of 2 kanees and 2 cowries of land, which, he alleged, had been sold to him by Joy Chunder and Kalee Sunkur; and which lands, however, Joy Chunder subsequently took back under an agreement that he would make over to the plaintiff 1 kanee and 19 gundahs of other lands in exchange for those which had been previously sold to him. This 1 kanee 19 gundahs of land, the plaintiff has since lost in a suit which was brought against him by Mohendro Chunder, Mohendro Chunder having established a better title to them than Joy Chunder. Thereupon, the plaintiff has brought this suit to obtain the lands which were originally sold to him, the exchange, under the decree obtained by Mohendro Chunder, being of no effect.

The Subordinate Judge of Tipperah, Mr. Hutchinson, has held that the plaintiff's suit is barred by limitation, because it has not been brought within 12 years either of the original sale or of the exchange.

On special appeal it is contended that this is wrong in law; that the plaintiff's cause of action did not originate until the 9th August 1866, when Mohendro Chunder's suit to recover possession of 1 kanee 19 gundahs of land was decreed.

It seems to be very clear that the plaintiff's cause of action did originate, as he states, on the 9th August 1866. He could not have sued for the original lands as long as he was in possession of the lands he obtained in exchange for the original lands; and it appears that he only lost the lands he obtained in exchange on the 9th August 1866, and his cause of action then originated, and it is evident that he is in time.

The decision of the Subordinate Judge on the question of limitation is set aside, and the case is remanded to him for trial on the merits.

Costs to follow the result.

The 17th September 1871.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Mortgage—Registration.

Case No. 692 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 10th March 1871, *reversing a decision of the Subordinate Judge of that District, dated the 30th November* 1870.

Sunkur Sahoy (Plaintiff) *Appellant,*

versus

Sheo Pershad Sookool and another (Defendants) *Respondents.*

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Mr. R. E. Twidale and *Baboo Grish Chunder Ghose* for Appellant.

Baboo Chunder Madhub Ghose and *Umbika Churn Banerjee* for Respondents.

An unregistered mortgage prior in date cannot take effect against a subsequent registered mortgage, whether the holder of the latter deed has or has not notice of the former.

Ainslie, J.—We see no reason to interfere in this case. The only question is whether an unregistered mortgage prior in date can take effect against a subsequent registered mortgage. The special appellant contends that he got possession, but as a fact the possession was long subsequent to the execution of the second mortgage. The mortgagee under the second mortgage sued on his bond and got a decree against the property and in execution purchased it himself. Subsequently, the appellant sued on his bond and got a decree, and in execution he purchased himself and his possession only began from that purchase; but even if there had been possession previous to the execution of the second mortgage, it seems extremely doubtful whether it would have been of any value.

It is true that sales under unregistered deeds have been held good against subsequent sales by registered deeds in consequence of possession having passed under the first, but there are two points in which such cases differ materially from cases of mortgage. One is that possession under the first sale would probably be construed as giving notice to the second purchaser; and another is that, after a sale, no title remains in the vendor, and that he cannot sell again except by a fraud. As to notice, Section 2 Act XIX of 1843 specially provides that the superior claim of the holder of a registered deed is not to be affected by any other deed for the same property which may not have been registered, whether the holder of the registered deed had or had not notice of the unregistered deed; and the element of fraud does not come in, because there is nothing to prevent a man mortgaging his property two or three times over if he can find persons willing to advance money upon it. The decision in page 197 of I Bengal Law Reports* appears to dispose of this case conclusively.

The appeal is dismissed with costs.

* *Proladh Misser* versus *Oodit Narain Singh*, X Weekly Reporter, p. 291.

The 23rd September 1871.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Batwara—Title—Co-defendants—Limitation.

Case No. 635 of 1871.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 27th February 1871, *modifying a decision of the Moonsiff of Mozufferpore, dated the 7th September* 1870.

Oodoy Singh and another (two of the Defendants) *Appellants,*

versus

Paluck Singh and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale for Appellants.

Moulvie Mahomed Yusoof for Respondents.

There is nothing in the law which makes the order of a Collector in a Batwara proceeding final as regards questions of title.

It was considered, under the circumstances of this case, not consistent with the principles of equity and good conscience, to refuse a clearly proved right on the technical ground that on one co-defendant's appeal no decision adverse to another co-defendant can be come to.

A suit to void a Batwara division by the Collector may be brought within 6 years

Glover, J.—This case has been very much complicated by the way in which it has been tried in the Court below, and it is exceedingly difficult in special appeal to discriminate between one claim and the other, because although this case comes before us only in the shape of one special appeal, the two cases have been so intimately connected together by the Courts below that the finding in appeal must take into consideration the circumstances of both. So far as the merits are concerned, the only question between the parties is whether the third son of Man Singh, Khuruck Sahee, who died childless, adopted during his lifetime his nephew Kripa Sahee, or whether his 10 gundahs 2 cowries 2 krants share was divided between his brothers Huree Sahee and Lochun Sahee (a genealogical table is given in the Moonsiff's decision, and it is unnecessary to refer to it more particularly here.) The plaintiffs in this case, Paluck Singh and his brothers, plaintiffs in No. 234 of the Judge's file, claim a 7 cowries

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and odd share of the property on the ground that by right of inheritance this would be the correct share coming to them from their great-grand-father Huree Sahee on the supposition that the 10 gundahs 2 cowries 2 krants share of Khuruck Sahee devolved on his nephew Kripa Sahee as adopted son.

Their case is that the other members of the family who have been made defendants either substantially or *pro formâ* got the Collector to make a Batwara of the estate dividing it into different puttees ; and that among these puttees their share has been absorbed, leaving them nothing of their own. They therefore sue to have their right declared, and to have it likewise declared that the land to which they are entitled is included within such and such of the defendants' puttees.

The other case not before us in special appeal but decided by both the Courts below was instituted by Pultoo and Gocool, sons of Gouree, who are descended from Lochun Sahee, the brother of Hurree Sahee. They claimed to get a 7 cowrie share of the family property out of the hands of one Deoranee Kooer, who purchased it from their uncle Ram Bhujjo. Their case was that Ram Bhujjo had sold to Deoranee Kooer 14 cowries including both his own and their share in the property. This suit of Pultoo and Gocool was dismissed by the Moonsiff for reasons which he has given in his decision. On appeal, the Judge decreed it, ordering the 7 cowries claimed to be taken from what had been purchased by Deoranee Kooer and given back to the plaintiff.

The Moonsiff gave Paluck Singh and his brothers their 7 cowries 2 krants share. We may here mention that their proper share would have been 10 cowries, but it is admitted that a 3 cowrie share was sold to a third party. The Moonsiff awarded the share of the plaintiffs in the following way : 1g. 2c. 1d. were to be taken from what was in Deroranee Kooer's possession, 1 cowrie from Abdoot Singh, and 1k. 2d. from Sheo Narain's share.

The appellants before us are Oodit and Golee Singh, who purchased, as they say, a 21 cowries share of the estate from Bheekoo Singh. Bheekoo Singh was descended from Saheb Singh, the third son of Kewul Sahee whose share was 3g. 2c. 2d., so that Bheekoo's share would amount to no more than 14 cowries, unless it were proved that Khuruck Sahee's share went to his brothers and and not to his adopted son Kripa Sahee.

The special appellants take various objections to the Judge's decision. They first contend that, as the estate had been finally divided into puttees by the Collector under the Batwarah Law, no civil suit would lie to set aside that arrangement ; that the plaintiffs might, if they had chosen, have objected to the Batwarah and have stopped its operation, but not having done so, they have now no remedy. They object further that as they were by the Moonsiff's decision absolved from the claim of Paluck Singh and his brothers, and as Paluck Singh did not appeal, the Judge was not justified on the appeal of Deoranee Kooer in passing a decision adverse to their interest, as on one co-defendant's appeal no decision adverse to another co-defendant can be come to. They likewise object that there has been no finding on the questions of special and general limitation pleaded by them. As to the question of the adoption of Kripa Sahee by Khuruk Sahee there seems to be no reasonable doubt. The Judge has distinctly stated that no objection ever was made to the statement of the plaintiff, no contrary evidence was given, and the Judge's finding that the adoption was made is a finding of fact which we cannot interfere with in special appeal.

As to the question of the Batwarah. In the first place, the plaintiffs do not ask to have any alteration made in the Batwarah arrangements carried on by the Collector; these may be, and no doubt are, final, for all fiscal purposes, and the plaintiffs have no object in getting them altered ; what they want is to have it declared that within certain puttees demarcated by the Collector certain lands belonging to their share of the family estate have been included, and they ask to have it pointed out in each particular puttee, where those lands are, in order that they may recover possession of the same. The only effect of a decision in their favour would be that in each of those puttees there would be one more co-sharer, but nothing would be done to invalidate the Batwarah or alter the boundaries fixed by the Collector. It is not necessary to go further than this, but we may remark there is nothing in the law which makes the order of a Collector in a Batwarah proceeding final as regards questions of title, and we do not see why a plaintiff who has a title to land should be

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debarred from having it tried, merely because the estate had been partitioned out into different puttees for purposes purely fiscal.

With regard to the other objection, it is quite true that the plaintiffs Paluck Singh and his brothers did not appeal against the Moonsiff's decision which threw out the case brought by Pultoo and Gowree, but then they had no possible object in so appealing. Their suit was to obtain a 7 cowrie share in the family estate and that was decreed to them from the lands held by Deoranee Kooer. It was immaterial to them that the Judge absolved Goolee and Oodit from their claim, as they had already got their share in the estate given up to them. There were three appeals before the Judge, and although Paluck Singh only appealed on the question of costs ,Pultoo and Gocool appealed on the question of title; they said that their father's share had been improperly sold and the Judge found that such was the case. Now that being so, and it being found that Deoranee Kooer had *bonâ fide* purchased a 7 cowries from Ram Bhujjo, the plaintiff's decree was rendered absolutely infructuous, for they had got a decree for 7 cowries as against Deoranee Kooer, which decree had been set aside on the appeal of another party. In the first instance, they had no object in appealing, but when the Judge's order reversed the decree of the Moonsiff, their position was altogether changed, and their decree altogether useless. It would not, we think, be consistent with the principles of equity and good conscience which guide the decisions of Civil Courts in this country, to refuse a clearly proved right on the technical ground taken by the special appellant. Under ordinary circumstances, his objection would no doubt be a good one; but if we were to allow it in this case, it would be depriving the plaintiffs of what is no doubt their share in the family property, and playing into the hands of those who have been throughout seeking to deprive them of it.

Under the circumstances, the Judge would have done well to have tried these cases separately as the purchases were at different times and the parties unconnected, but it would not be proper in the special appeal stage to throw out parties who have a substantial right on a purely technical objection, and as a matter of fact there has not been any injustice done to anybody by the decision of the Lower Appellate Court. According to the finding of fact come to by the Judge, it is clear that Bheekoo Singh had but 14 cowries to sell; and as the sale to Oodit and Goolee of 21 cowries was altogether improperly made, so far as the justice of the case is concerned, the Judge has done substantially right in taking these 7 cowries from Oodit and Goolee and giving them to the parties who have a proved right to that share.

On the question of special limitation, there is no law which we are acquainted with which makes it necessary to bring a suit to void a Batwarah division by the Collector within three years. Section 6 does not apply, and if the case comes within any Section at all, it comes within the six years limitation Section, and the suit is therefore in time.

As to the question of general limitation, we think that the Judge has sufficiently found that the plaintiffs have been in possession within a period of twelve years and that they were not put out of possession of their share, (the estate being at the time a joint and undivided one) until the Collector divided the several puttees.

With regard to the merits, we have already said that the Judge's decision although somewhat involved is substantially right, and we see no reason to interfere with it.

We dismiss the special appeal with costs.

The 22nd November 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Attachment—Manager—Section 243 Act VIII of 1859—Circular Orders.

Case No. 220 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 22nd April 1871.

Bunwaree Lall Sahoo (Decree-holder) *Appellant,*

versus

Baboo Girdharee Singh (Judgment-debtor) *Respondent.*

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Messrs. C. Piffard and *C. Gregory* and *Moulvie Mahomed Yusoof* for Appellant.

Mr. Woodroffe and *Baboo Hem Chunder Banerjee* for Respondent.

A Court cannot refuse to order attachment on application of a decree-holder, nor appoint a manager under Section 243 Act VIII of 1859 till after attachment.

The Circular Order of 11th July last must be taken, not as prescribing any rigid limit of time during which a property is to continue under the management of a manager, but as requiring that in each case, the Judge who directs the appointment of a manager should exercise a proper discretion, with reference to all the circumstances of the case, in calculating the time for the payment of the judgment debt.

Loch, J.—In this case, it appears that certain estates, the property of Baboo Girdharee Singh, judgment-debtor, were attached in execution of a decree held by certain mahajuns, Lalljee Sahoo, and others; and that by orders of the Lower Court, made about two years ago under Section 243 Act VIII of 1859, a manager was appointed to make collections from these mehals and to pay off debts due by the debtor. Subsequent to this arrangement, the judgment-debtor filed a list of other properties which belonged to him, and prayed that, as he had several other debts outstanding, the Court would order the manager to take charge of these other mehals and from their proceeds to liquidate his debts. An order in conformity with this prayer was issued by this Court. After this order was made, Baboo Bunwaree Lall and others, who held decrees against the debtor Girdharee Singh, applied to the Court for attachment and sale of the property of the judgment-debtor in execution of their decrees. But the Court, instead of issuing any order for attachment or making any order for sale, directed that the manager should pay the interest upon those debts for two years, and that after that period, when certain Bhurna leases would expire, there would be sufficient funds to pay off the debts of these creditors in the course of about five or six years, and the Subordinate Judge rejected their application.

An appeal has been preferred to us against this order, and the objections taken in appeal are two: first, that the order is contrary to law, there having been no attachment made by the decree-holders; and, secondly, that the data upon which calculation of assets is based are altogether erroneous, having been assumed by the Subordinate Judge without any evidence being before him, and being adopted from the statements made by the debtor, and further the Subordinate Judge has estimated the assets of the estates higher than the debtor had done himself, but upon no sufficient ground.

It appears to me that the order of the lower Court must be set aside; because it is clear that, till an attachment is made on the application of the decree-holders, the Court cannot proceed under the provisions of Section 243 to appoint a manager; further the refusal to make an attachment when applied for by a decree-holder is not a light matter, for it may prove of serious detriment to him, because should any other party attach the property, his right as first attaching creditor to be paid off his whole debt from the proceeds of sale may be lost to him.

Then, on the second ground, it is clear that the Subordinate Judge, in calculating the assets, has not gone upon any evidence, but has been satisfied with the statement made by the debtor as to the value of his property. This is not sufficient in a case like the present, when a man is almost hopelessly involved in debt, and who, in order to save his estate from sale, may be expected to make the most favourable returns of his income.

I think the appellants in this case must be allowed to make an attachment according to law; and after making that attachment, the Court may proceed under the law either to order the sale of the property, or under the provisions of Section 243 to appoint a manager should that be considered to be the best course both for the creditor and for the debtor.

Reference has been made to an order of this Court issued in July last, in which the Court stated that two or three years should ordinarily be the limit for which a property should be put under the charge of a manager. The Court does not, I apprehend, intend by these words to limit the time strictly to that period in all cases, but requires thereby that in each case the Judge who directs the appointment of a manager should exercise a proper discretion, with reference to all the circumstances of the case, in calculating the time in which the debts may be paid off. If after a year or two it appears that the collections are insufficient to meet the claims of the creditors, there is no reason why an application should not be made to the Court for the removal of the manager and for the sale of the property.

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I think, therefore, that the order of the lower Court must be set aside and the appeal be decreed.

Parties will pay their own costs.

Ainslie, J.—I concur in thinking that the refusal to order the attachment was wrong, and that the case must go back to the lower Court in order that the judgment-creditor may be allowed to attach any property of the debtor he may point out. The lower Court, if advised to proceed under Section 243, will then be guided by the rules laid down in the Circular Order of the 11th July last. I quite concur with Mr. Justice Loch in thinking that that rule is not to be taken as prescribing any rigid limit of time during which a property is to continue under the management of a manager. With reference to the magnitude of the estate and the length of time the debts have been allowed to run on, I think no substantial injury would be done to the judgment-creditors in these cases by an extension of time; and, as pointed out by my learned colleague, if the result of the management shows that there has been miscalculation of the assets, the creditors can always apply to the Court to set aside the order appointing the manager, and to proceed under other Sections relating to execution of decrees.

The 22nd November 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution—Agreement.

Case No. 238 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Cuttack, dated the 1st June 1871.

Kanhya Lall Pundit (Decree-holder) *Appellant,*

versus

The Court of Wards on behalf of the estate of Rajah Puddo Lal Bhunj (Judgment-debtor) *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

In execution of a decree a judgment-debtor cannot be ordered to pay a sum beyond what is stated in the decree, although he may have, after the decree, agreed with the decree-holder to do so.

Jackson, J.—We think that the decision of the Lower Appellate Court in this case is correct. It was passed in execution of a decree for a debt of 5,551 rupees. After the decree had been passed, it appears that the decree-holder and the judgment-debtor came to some arrangement under which it was agreed that the judgment-debtor's property should not be put up for sale, and that the amount of the decree should be paid in instalments at a very large rate of interest from year to year for eight years. Under this the amount of the decree swelled from 5,551 rupees to nearly 20,000 rupees. In 1860, the first instalment was paid by the Rajah. Subsequently to that, however, the instalments appear not to have been paid; but in 1871, the property having in the meanwhile been taken possession of by the Collector of the district as the Court of Wards, a sum of 14,877 rupees 1 anna 5 pie was paid into Court. There remained then only rupees 4,083-4-5 still due under this agreement between the parties, and for this sum the decree-holder is now taking these proceedings. The lower Court has held that this sum being in excess of the amount originally decreed cannot be obtained in execution of this decree. It is very certain that this sum could not in any way have been obtained under the terms of the decree passed in this suit. In order to obtain it the decree-holder must prove the execution of the subsequent agreement.

It is true that mere agreements to pay the original decree by instalments have been frequently upheld and properly upheld; but this is a case in which the judgment-debtor has agreed to pay a very large sum of money over and above the amount of the original decree, and we are informed that even the validity of that agreement can be contested. Under these circumstances, it would not be proper in execution of this decree to direct the payment by the judgment-debtor of a sum beyond what is stated in the decree. The party can always bring his suit to enforce the contract subsequently entered into between him and the judgment-debtor.

The appeal is dismissed with costs.

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The 23rd November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Res judicata—Leave to bring new Suit.

Case No. 671 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 14th March 1871, *reversing a decision of the Moonsiff of Sitakoond, dated the 8th September* 1870.

Sreemotee Mona Bibee and others (Plaintiffs) *Appellants,*

versus

Oomed Ali (Defendant) *Respondent.*

Baboo Aukhil Chunder Sein for Appellants.

No one for Respondent.

A suit is not barred by the principle of *res judicata* because, in a former case between the same parties and on the same cause of action, the plaintiff, after the evidence had been recorded but before final judgment was passed, obtained the Court's permission to withdraw the case with reservation of leave to bring another suit.

Observations on decision of Privy Council in Watson *versus* Collector of Rajshaye, XII W. R. (P. C.) p. 43.

Glover, J.—THE only point taken in this special appeal is, that the Subordinate Judge was wrong in holding that the suit was barred by the principle of *res adjudicata.*

It appears that in a former case between the same parties and on the same cause of action, the plaintiff, after the evidence had been recorded, obtained the Court's permission to withdraw the case with permission to bring another suit hereafter.

The Subordinate Judge has considered that this reservation on the part of the Court by which the permission was given, did not prevent him from going into the question of *res adjudicata,* and deciding the suit on that principle. In support of his opinion, he has referred to the case (reported in XII Weekly Reporter, page 43) of Watson and others against the Collector of Rajshahye, decided by the Privy Council on the 15th July 1869, and thinks that the precedent proves that, even where a reservation is made, that does not prevent the Court before whom the case comes on the second occasion from going into the question of *res adjudicata.*

Now the precedent thus quoted has nothing to do with the present case. In the case before the Privy Council, a decree had been passed in favor of the defendant and against the plaintiff, on the ground that the plaintiff had altogether failed to prove his case by evidence; there was, undoubtedly, in the decree, a reservation allowing him to bring another suit; but the case had, as a matter of fact, proceeded to final judgment on the failure of the plaintiff to make out his pleas. Now Section 97 Act VIII of 1859 allows a Court, in all cases where sufficient ground is shown and where *final judgment* has not been passed, to give permission to a plaintiff to bring a fresh suit; and in this case no final judgment has been passed, for, although evidence was recorded, no decision was given on that evidence.

It appears to us, therefore, that the Subordinate Judge was wrong in deciding this case on the principle of *res adjudicata* inasmuch as the merits were not decided on the first hearing, and by law the original Court had, under such circumstances, the power to give the plaintiff authority to bring another suit.

The decision of the Lower Appellate Court will be set aside and the case remanded for re-trial. The costs of this special appeal must be borne by the special respondent, the other costs to follow the result of the remand.

The 23rd November 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Inheritance—Daughter.

Case No. 549 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 21st February 1871, *affirming a decision of the Subordinate Judge of that District, dated the 13th December* 1870.

Nyo Chowdhry (Defendant) *Appellant,*

versus

Futtah Chowdhry (Plaintiff) *Respondent.*

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Baboo Aukhil Chunder Sein for Appellant.

Mr. R. E. Twidale for Respondent.

Semble,—a daughter becomes entitled to her share upon the death of her father and not after her mother's death.

Couch, C. J.—KALA BIBEE was the daughter, and as such had a title to a share of this property; and there does not appear to be any authority for saying that she would become entitled to that share only after her mother's death. It would seem from the passage in the book handed up to us that the daughter would become entitled to a share of the property upon the death of the father. She having that share has conveyed it, by an instrument which the lower Courts found was duly executed, to the plaintiff. That certainly would give the plaintiff a *primâ facie* title to the share.

The position of the defendant appears to be this,—that a suit was brought against the mother and the son and also against Kala Bibee. She was included in that suit, but she does not seem to have appeared and probably was not duly served with the summons. A decree was made in that suit against the mother and the son, but not against Kala Bibee; and the decree authorized the sale of the right and interest of the mother and the son, which did not include the share of Kala Bibee, because the words "estate of the deceased" would not have the effect of authorizing a sale of a portion of the estate of the deceased in the hands of a person not a party to the suit, or a share to which a person against whom the decree was not made claimed to be entitled. The defendant purchased as is alleged upon the sale in execution of that decree. It appears to us that he did not by that purchase acquire any title to Kala Bibee's share. He claims merely as having purchased under that decree. We do not think he is in a position to contend that there was no consideration for the conveyance from Kala Bibee to the plaintiff. He has no right whatever. There may be cases, no doubt, in which a defendant would be entitled to put a person claiming to prove that an alleged sale or conveyance was not collusive, but a real and *bonâ fide* conveyance executed for consideration. But this does not appear to be one of those cases. The defendant appears to have no title, and the plaintiff has a sufficient *primâ facie* title to give him a right to recover in this suit.

We do not see that there has been any error in law in the way in which the Lower Appellate Court has dealt with the questions raised in the suit. The appeal must be dismissed with costs.

The 23rd November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Joint Hindoo family — Easement — User—Obstruction.

Case No. 439 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 29th December 1870, *reversing a decision of the Moonsiff of that District, dated the 26th February* 1870.

Chunder Kant Chowdhry and others, (Defendants) *Appellants,*

versus

Nund Lall Chowdhry and others (Plaintiffs) *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Doorga Churn Doss for Respondents.

Suit by members of a joint-family to enforce their right to a pathway through a door (which had been blocked up) leading to a joint Thakoorbaree. *Held* that this was not a case in which the plaintiffs claimed the right of user, but only complained of the obstruction of a passage belonging to them jointly with the defendants.

Paul, J.—THIS is a very simple case. The facts are shortly these:—The plaintiffs alleged in their plaint that a certain pathway leading from their family-dwelling-house to a certain Thakoorbaree belonging to them had been obstructed by the defendants having bricked up the passage through a door. The plaint showed that this obstruction took place in 1272, and the present action was brought in 1276, that is, after the lapse of four years.

Upon this state of facts, it became necessary to enquire whether the matters stated in the plaint were true or not, as the cause of action admittedly had arisen within the period of limitation.

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The defendants set up various pleas amounting to acquiescence on the part of the plaintiffs and their abandonment of the right of way. The other defences were also of a similar character.

The first Court found that the obstruction took place in 1267 and proceeding on that finding, held that the plaintiffs' rights were barred by acquiescence.

The Appellate Court differed from the first Court upon the question as to when the obstruction first took place, and held that it did not take place in 1267, but in 1272, and found that whether it took place in 1267 or in 1272, the cause of action arose within the period of limitation and there was no acquiescence or abandonment of right by the plaintiffs either in law or in fact. Having overruled this preliminary objection, the Appellate Court, in a lengthy and apparently duly considered judgment, came to the conclusion that all the facts on which the plaintiffs relied were true, *viz.*, that the Thakoorbaree was the joint property of the plaintiffs and the defendants, that the pathway was also their joint property, both having come into existence many years ago at the time of their ancestors, and that the obstruction caused by the defendants was a clear infraction of the undoubted rights of the plaintiffs. The Lower Appellate Court accordingly decreed the plaintiffs' suit.

It appears that, on a former occasion, a suit was instituted by one of these plaintiffs against these defendants in respect of some interest in the Thakoorbaree, the pathway, the door which was blocked up, a bungalow, and an adjacent wall. In that suit a somewhat confused and unintelligible decision was pronounced to the effect that the plaintiff had a joint interest in the Thakoorbaree and the ground on which the door was erected, but not in the door or the wall adjoining the ground. Consequently, the plaintiff's suit was partly decreed and partly dismissed.

The Judge of the Lower Appellate Court seems to have considered that the plaintiff in that suit had wholly succeeded in obtaining the relief he sought, and in thinking so he doubtless put a wrong construction on the decree which was pronounced in that case, but that wrong construction was only as to a part, *viz.*, that part of the decree which provided that the *durwaja* belonged to the defendants.

Baboo Mohinee Mohun Roy for the defendant, appellant, contends that this wrong construction has prejudiced his clients' case, completely obscuring the intellect of the Judge below and drawing him to a conclusion of fact at which he would never have arrived but for this wrong construction. Beyond admitting the fact that there was a construction put by the Lower Appellate Court as to a part of the decree, we cannot follow the learned pleader to the extent to which he carries his argument. We find the Lower Appellate Court has duly considered all the oral evidence in the case, apart from any opinion which he may have formed upon the construction of the decree, and has come to a clear and deliberate conclusion on the facts stated by the plaintiffs. The case, therefore, is one in which the plaintiffs, as members of a joint family, seek to enforce their right to a pathway through a door (which has been blocked up) leading to a joint Thakoorbaree; and to an unbiassed mind no clearer case could well be conceived.

It has, however, been contended by Baboo Mohinee Mohun Roy that the judgment of the first Court was right, which proceeded on the plea of acquiescence on the part of the plaintiffs as set up by the defendant. But non-user of a pathway, either for nine years as stated by the defendants, or for four years as admitted by the plaintiffs, does not necessarily constitute an abandonment of any right which the plaintiffs may have possessed. Several cases have been cited in support of the position taken up by the first Court. Speaking for myself, I must say that if it were necessary to decide this case on the strength of the cases cited, I should have been disposed to refer the matter to a Full Bench. The cases cited are reported in Weekly Reporter, Volume XV, pages 295, 402, and Weekly Reporter, Volume XIV, page 79. It appears to me, however, that these cases refer to a different state of facts with a different class of rights. They relate to a case in which one man acquires by reason of uninterrupted user a right over another man's land; and it may well be that in some instances, from a long disuse of a certain right, abandonment thereof may be inferred; but I am far from thinking that mere disuse of a certain right for 4 or 5 years is sufficient to constitute an abandonment of that right. The plaintiffs' case here is distinguishable. The plaintiffs do not claim a right of user. They complain of the obstruction of a passage which

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belongs to them jointly with the defendants. The analogy therefore altogether fails, and this case, which I at first stated was a very simple case, became somewhat complicated by the fact of the Judge of the first Court having allowed his mind to wander into irrelevant matters which have no existence in this particular case.

The special appeal is dismissed with costs.

Bayley, J.—I concur in the order of dismissal of this special appeal. In fact, the pleader for the special appellant opened his case on the ground that the acquiescence and waiver by the plaintiff of his right gave him, defendant, a title to have the masonry closing up the door-way of the path to the Thakoorbaree maintained. The issues fixed by the first Court involved both the question of right to the property and the question of acquiescence in the interference with the right of user, and the first Court decided the case solely and exclusively on the ground of acquiescence in the interference with the right of user.

The Lower Appellate Court more fully went into the question of right; and although to a certain degree it has gone wrong in its treatment of the case, yet on the whole it has come to a right conclusion of fact in favor of the plaintiffs.

It has to be remarked, however, that only one of the plaintiffs in this case is at all bound by the decision of 1865, on which so much stress has been laid by the pleader for the special appellant; but irrespective of this, the decision itself clearly refers to a joint proprietary right in the ground on which the wall and the door stood, and to a joint proprietary right in the Thakoorbaree which was clearly decreed to the plaintiff, although the adjoining Bungalow and *Durwaja* were not included in the decree in the plaintiff's favor in that case. This is, therefore, as Mr. Justice Paul has pointed out, mainly and truly of the character of a suit where the question is whether a party having a declaration of his right to a Thakoorbaree has a right to go through a door to that Thakoorbaree, and the question of user has thus been somewhat incorrectly made the main point in the case. In this view, the cases cited by the pleader and referred to by Mr. Justice Paul do not touch this case, and I would not therefore enter into them. I would further state that in my view every case of user should be disposed of with reference to its own surrounding circumstances, although the general principles of law have of course to be considered also. Every precedent cited upon a case of one special character of easement will not necessarily apply to a case of another character of easement. I think we are not warranted to interfere in special appeal with the view formed by the Judge below, for I think that the finding which he has arrived at is substantially correct in law.

The 24th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Abatement of rent—Diluvion—Talook—Permanent Settlement.

Case No. 716 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 19*th April* 1871, *reversing a decision of the Moonsiff of Dowlutkhan, dated the* 21*st February* 1871.

Ram Churn Bysack and another (Plaintiffs) *Appellants,*

versus

Mr. Lucas Theodorus Lucas (Defendant) *Respondent.*

Baboo Kalee Kissen Sein for Appellants.

Baboo Doorga Mohun Dass for Respondent.

Quære.—Whether the proprietor of a talook created before the Permanent Settlement can claim abatement of rent on the ground of diluvion.

Glover, J.—THIS was a suit for arrears of rent, met on the part of the defendant with a plea for abatement on the ground of diluvion. The land formed part of a talook admittedly created before the date of the perpetual settlement.

The Moonsiff decided that the defendant's plea of diluvion was not proved.

The Judge on appeal held that there had been no sufficient enquiry into this point and directed a local investigation to be made.

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He held that a talookdar in the position of the defendant could claim abatement if any part of his talook was proved to have been diluviated.

Against this decision the plaintiff appeals specially, urging—

(1) That the proprietor of a talook created before the permanent settlement cannot claim abatement ;

(2) That, if he could, the neglect of the defendant to advance his plea for a period of from 30 to 35 years bars it ; and

(3) That as the measurement ordered by the Moonsiff was stopped by the defendant's own act, he is not now entitled to have a fresh measurement, but must stand or fall on the evidence he elected to adduce.

We have very considerable doubt as to a talookdar whose tenure existed from before 1790 having the right to claim abatement, and in this case payment of the full rent year by year, more than 30 years after the lands are said to have been washed away, would be strong evidence that no such claim was in the contemplation of either party when the contract was originally made.

But there is no present necessity for deciding this point, because we think that under the circumstances the defendant had no right to a fresh measurement, but should have been made to abide the consequence of his own election.

The measurement ordered by the Moonsiff was stopped *re infectâ* at the request of the defendant who filed a petition to the effect that local enquiry was unnecessary and that he, defendant, would prove the diluvion and its extent by oral testimony.

Now this oral testimony consists of the depositions of five witnesses which prove nothing at all, and of one statement to the effect that same 30 years ago one Mouzah was diluviated. It is in fact admitted by the special respondent's pleader that there is nothing that can be called evidence on the record in support of the diluvion.

We think that the defendant ought undoubtedly to be made to bear the consequences of his own acts. Had he not interfered, the measurement would have been fully carried out and the dispute so far settled. He asked that the local enquiry might be stopped and chose to rest his case on the evidence of his witnesses; and they having failed he had no right to ask that a fresh measurement should be made (to the great detriment of the plaintiff who was kept all the time out of his rents) and all the trouble and expense of a local enquiry undergone *de novo*. The case between the litigants should then have been decided on the recorded evidence, and if that test had been applied, the defendant would have admittedly failed.

We reverse the order of the Judge and restore the *decree* of the Court of first instance, with all costs.

The 24th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Limitation—Pleading.

Case No. 715 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 27th March 1871, *affirming a decision of the Moonsiff of Nubeegunge, dated the 29th July* 1870.

Hossein Buksh (Defendant) *Appellant,*

versus

Ameena Khatoon and another (Plaintiffs) *Respondents.*

Baboo Bipro Doss Mookerjee for Appellant.

Baboo Grish Chunder Ghose for Respondents.

A Court should give specific reasons and declare judicially why it holds that a plea of limitation is worthless or of no force.

Bayley, J.—We think this case must be remanded to the Lower Appellate Court for proper trial on the question of limitation. The only remark the Lower Appellate Court makes on this important plea is that the point is worthless. Whether it is so on account of the reasons given by the Moonsiff, or because the cause of action arose on the date of sale and not on the date of settlement, or because on the merits the Lower

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Appellate Court has found as a fact that there has been no adverse possession on the part of the defendant so as to create a title in him under the limitation law, is left unexplained and not judicially decided. The Judge of the Lower Appellate Court should give specific reasons for his conclusion, and declare judicially whether on any of the above reasons or on others he holds that the plea of limitation taken by the defendant is of no force.

The costs will follow the eventual result.

The 24th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Kabooolent—Joint sharers—Parties.

Case No. 674 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 11th March 1871, modifying a decision of the Deputy Collector of Kishoregunge, dated the 23rd September 1870.

Hur Kishore Doss Bhooyah (Defendant) *Appellant,*

versus

Joogul Kishore Shaha Roy (Plaintiff) *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Sreenath Banerjee for Respondent.

One of several shareholders who obtained a decree for a kabooleut from several defendants, cannot sue for his individual and separate share of the rents, without making all the shareholders parties.

Paul, J.—In this case the plaintiff jointly with others obtained a decree for a kabooleut from the defendants with the exception of the three defendants who do not appeal. A kabooleut was decreed to be executed jointly by all the defendants in favor of the plaintiff together with other share-holders who were joint plaintiffs in that suit. The plaintiff now sues for his individual and separate share of certain rents partly composed of the enhanced rent decreed in the first suit, and it is pleaded against him that his suit is informal and cannot proceed on the ground that the defendants are jointly liable for the arrears sued for, and that all the share-holders not being made parties, the suit must fail.

This objection is valid in law. The special appeal is, therefore, decreed, and the plaintiff's suit dismissed with all costs.

The 27th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Ferry — Proprietary rights—Dispossession.

Case No. 762 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 22nd May 1871, reversing a decision of the Moonsiff of Beergunge, dated the 28th February 1871.

Kishoree Lall Roy (Plaintiff) *Appellant,*

versus

Gokool Monee Chowdhrain and another (Defendants) *Respondents.*

Baboo Tarucknath Sein for Appellant.

Baboo Kalee Kishen Sein for Respondents.

There are proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom by running a boat, if not exactly on the same line, at least within such a distance as for all practical purposes would be the same as if it were on the same line.

Preventing parties from crossing in a person's ferry and driving his men away, amount to dispossession.

Bayley, J.—We think the judgment of the Lower Appellate Court must be reversed with costs. The plaintiff sued for the recovery of possession of an old ferry and the removal of a new ferry situated within a russee of the old one, as interfering with his private rights attaching to the old ferry.

The Moonsiff, in an elaborate judgment, wherein the evidence is most fully collated and considered, held, *firstly*, that the plaintiff had been illegally dispossessed of his old private ferry; and *secondly*, that he was entitled to a decree on his suit, that is to say, to a decree for possession of the old

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ferry and for removal of the new ferry situated within half a russee distance of the old, as interfering with the plaintiff's private rights.

On appeal, the Judge reversed the judgment of the first Court with the following remarks :—" The plaintiff's is not an exclu- " sive right of possession and the fact he tries " to prove, *viz.*, that the defendants prevent- " ed parties from crossing in his boat and " drove his men away, is not, I think, a " matter of dispossession, even if he had " any possessory rights, which I think he " has not beyond that he is entitled now as " formerly to ply his ferry, but not to the " exclusion of all other parties." Again— " If an exclusive right were given to him, " how far would it extend ? It is impossi- " ble to draw a line here, it may be for one " yard or one mile up and down the river." And further on—" The fact that the de- " fendants should set up an opposition ferry " in the vicinity is no more than a trader " in a village setting up a shop in opposition " to a trader of the same class in the same " village."

Now in the first place, as to the alleged dispossession—if the fact of the defendant's preventing parties from crossing in the plaintiff's boat and driving his men away does not amount to a dispossession of the plaintiff, his possessory rights being admitted, it is difficult to conceive what dispossession from a ferry may be.

Secondly, there is no analogy between setting up a shop side by side with another as is a customary and recognized practice, and locating another ferry within such distance as must more or less diminish the profits of the old ferry and thus interfere with the private rights of the owner thereof. It is recognized that there are proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom as would be the result by running a boat if not exactly on the same line, at least within such a distance as for all practical purposes would be the same as if it were on the same line. The Moonsiff's judgment shows that the plaintiff's claim was decreed, that is, his prayer for recovery of possession and for removal of the new ferry from within half a russee distance of his old ferry, and the Moonsiff's judgment is correct in principle and law.

The decree of the Lower Appellate Court is reversed and that of the first Court restored with costs.

The 27th November 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Hindoo Law — Priestly Office — Women.

Case No. 783 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Burpetta, dated the 25th April 1871, *affirming a decision of the Moonsiff of that District, dated the 27th February* 1871.

Joy Deb Surmah (Plaintiff) *Appellant,*

versus

Huroputty Surmah (Defendant) *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellant.

Baboo Sreenath Doss for Respondent.

Quære.—Whether, according to Hindoo Law, a woman can succeed to a priestly office.

Bayley, J.—THIS case must be remanded to the Lower Appellate Court to try the question as to the truth of the appointment by Joynath of the defendant Huroputty his son-in-law in the office of Dolloi and the validity of that appointment.

The *first* Court has come to a clear finding on the evidence both on the question of the fact of the appointment and the validity of it, but the *Lower Appellate Court* has not given a clear and judicial decision upon that point.

The plaintiff sued to succeed his younger brother Joynath in the hereditary post of Dolloi or Chewa Chullooah of Parrey Huressur Temple in Burpetta, Assam.

The defendant's case was that he was the son-in-law of the former incumbent Joynath, and was entitled to succeed by reason of an appointment made by Joynath.

The issues fixed by the first Court upon the pleadings were: firstly, whether the Dolloi pod (which is repeatedly translated on the record by the local authorities to be office of priest) was hereditary or was the appointment optional; and secondly, whether the plaintiff or the defendant had preferential right thereto.

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The first Court found that the Dolloi pod (office of priest) was the hereditary office of Joynath deceased, and the Court then went on to state its conclusion upon the evidence in these words :—"It appears from the evidence of the witnesses that the said Joynath Dolloi deceased before his death *had appointed* the said Huroputty to the said *pod* (*viz.*, the office of priest) and brought the matter to the notice of Government." The first Court then without prejudice to the right to the respective shares of the litigant parties in respect of the profits arising from the said Dolloi pod, decided the claim for the Dolloi pod (office of priest) in favor of the defendant, and dismissed the plaintiff's suit.

On appeal, the Lower Appellate Court says that "it would appear that there are strong grounds for believing that the post of Dolloi was vested in the late Joynath at his absolute disposal," but the Court does not find judicially on evidence that it was so. The Lower Appellate Court then goes on :—"The "particular customs in regard to succession "to the post of Dolloi of the temple which "obtained prior to the date of endowment "would not have been without weight had "any reliable evidence been produced with "respect to them ; but in the absence of any "proof to the contrary, it must be held for "the disposal of this suit that the office of "Dolloi was vested in the late Joynath by "the deed of endowment obtained by him "from the British Government, and on his "death succession to the office became "amenable to the ordinary laws of Hindoo "inheritance." Further on, the Lower Appellate Court says :—"The claims of the "elder brother and cousin are not admissible "during the lifetime of the widow and "daughter of the deceased." Then with reference to the arguments of the plaintiff's pleader that a female could not succeed to a sacerdotal office, the Lower Appellate Court says :—"There are several decisions "of the High Court showing that there is "nothing opposed to such a succession, as "the female can always appoint a com-"petent person to act for her." The Lower Appellate Court accordingly decreed that the widow of the deceased be declared as heir and that the defendant Huroputty be recognized as Dolloi only as agent of the widow during her lifetime.

The main grounds taken in special appeal are—that a female cannot succeed to the office of Dolloi in this particular case, that Joynath could not in any way divest the succession to the post of Dolloi which was hereditary, and that the plaintiff as being the nearest male heir of Joynath was entitled to succeed to the post under the Hindoo Law.

The *first* point to be decided by the Lower Appellate Court was whether there was evidence and what evidence to show an appointment made by Joynath of his son-in-law in the office of priest and whether it was valid. It is not sufficient to say that there are grounds for believing that the post was vested in Joynath at his absolute disposal. The finding must be on judicial evidence especially when the Lower Appellate Court itself doubts as to the custom which regulated the succession. Having found this issue, it will be necessary for the Lower Appellate Court to consider the objection taken in special appeal, *viz.*, whether the widow could succeed to the office of Dolloi of the temple. On this point the case put forward by the pleader for the special respondent is that, even if the widow could not perform the service herself, she could do it by an agent appointed by her for that purpose, and he refers to the case of the Kaleeghat Haldars and the Mullick family as succeeding to the shebaitship of a Hindoo religious institution. These, however, are not cases of actual priesthood, but of certain rights giving profits to shebait to be enjoyed in rotation. The special appellants' pleader referred us to Colebrooke's Digest, Book II, Chapter 3, Section 63, shewing that a priestly office cannot be performed by a woman. The special respondent can show us no authority to the contrary, nor does the Lower Appellate Court state any of the cases to which it refers.

With these remarks, therefore, the case should be remanded to the Lower Appellate Court. The Lower Appellate Court will determine whether Joynath did make the appointment averred by defendant, and if so, whether Joynath had power to make such appointment, and further whether with reference to any particular custom or rule of Hindoo Law a woman is entitled to succeed in the *priestly office* in this case. If these facts are found in the affirmative, the plaintiff's suit must be dismissed. If in the negative, the plaintiff will be entitled to a decree as the next heir of Joynath.

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The 27th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Right of way—Easement—User.

Case No. 800 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 8th May 1871, *reversing a decision of the Sudder Moonsiff of that District, dated the 15th December* 1870.

Ram Gunga Doss (Plaintiff) *Appellant,*

versus

Gobind Chunder Doss and others (Defendants) *Respondents.*

Baboo Kalee Mohun Dass for Appellant.

Baboo Grish Chunder Ghose for Respondents.

A right of way need not have its origin in an express grant, but may be established by continued user for a certain period constituting adverse possession.

Paul, J.—In this case the plaintiff sued to have his right of way established over plots 4, 3, 2, and 1, leading from the house of the plaintiff to a road on the east of the house of the defendant. His complaint was that some portion of the pathway over plot 1 was completely obstructed by the defendant and some portion of the pathway over plots 3 and 4 narrowed.

The judgment of the first Court was in these words :—"As regards the first issue "it is be observed that the pathway over the "disputed kitta 1*st* is in fact the pathway "leading to the other pathway and the pond, "the east of the defendant's house, and it "has been proved by the evidence of the "*respectable witnesses on both sides* that "there was a pathway since a long time "running from the western end of the above-"mentioned pathway in a southward direc-"tion and then joining with the disputed "kitta 3*rd* runs southward through kitta 4*th*, "and then turns westward and proceeding "to the house of Sudanund Surma and of "the plaintiff and from thence to the roads "on the north and south of place on the east "of the defendant's house, &c." The above quotation from the judgment proves that many years—upwards of twelve years—ago the present plaintiff had a house to the east of the present defendant's house, and that he was for a long time in the habit of walking over and using the pathway in his visits to Sudanund Surma and otherwise. It further appears that not only the plaintiff but other persons made use of this path, and under the circumstances so stated a clear right of user has been established by the plaintiff over the land subject to a small modification which will be hereafter noticed.

The Judge in appeal held that the Moonsiff was wrong, and in the 3rd para. of his judgment the Judge observes :—"The plain-"tiff's allegation is that for more than 12 "years he had passed to and fro along this "path which had been in existence, 'for a "long time.' By what right he had passed to "and fro he does not exactly state, but his "pleader in reply to my question on this point "stated that the path was a public thorough-"fare, and that therefore his client had a right "of way over it." It is quite clear that the basis of the whole of the judgment is altogether a mistake. The facts stated, *viz.*, that the plaintiff had passed to and fro along the path for upwards of 12 years is quite sufficient to support the right he claimed. But the Judge asks by what right he passed to and fro the path? The Judge seems to entertain an idea that a right of way should have its origin in an express grant made in favor of the party claiming the right. A grant, no doubt, is one of the modes in which a right of way may be established, but a continued user for a certain period of time which would constitute adverse possession in an ordinary suit might also be, and is often deemed, sufficient to establish a right of way. Following out the view last mentioned, the Judge says in describing the evidence of the first witness :—"The first "witness for the plaintiff, Sama Churn, a "vakeel, says that defendant's brother 10 "or 11 years ago made the road for the "convenience of the priest and that the "villagers by private arrangement would "go along it up to defendant's yards "and then east over plot first to the road "on the east of defendant's Baree. Now "this shows, *first*, that it was a private road, "and *secondly*, that villagers went by per-"mission." Now, whether the road was private or not is not very material; at least it was not so private as to prevent access to it by passengers. Then it is said that villagers went by permission. What that permission was does not appear unless it be

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the private arrangement referred to above, and what that private arrangement was is not at all stated in the record. Upon the whole, it is clear that the plaintiff did not go by any express permission, but by a right acquired by being allowed to pass over the road for a great number of years without objection, and it can hardly be contended that rights are not often acquired in that way by a party being permitted to pass without obstruction and without objection. In conclusion the Judge says:—"If, as I "believe, the defendant has permitted the "villagers including plaintiff to go over his "road since he made it in 1265, they have "acquired no right to do so; and the defen-"dant may close it entirely, I mean all "four plots, if he pleases." As we have previously observed, no special permission is pleaded in this case, and if there were any such, it amounted merely to the want of objection. The Judge reverses the decision of the Moonsiff on reading the evidence of the plaintiff's witnesses, but it is quite clear that he has misconstrued that evidence because the plaintiff's witnesses prove the existence of the pathway leading on to the plaintiff's house for a great length of time. The first Court on this point says that the witnesses of the plaintiff and the defendant pretty well agree. That has been clearly shewn to be the case by Baboo Kalee Mohun Doss, and Baboo Grish Chunder Ghose very candidly admits that Baboo Kalee Mohun Doss's construction on this point is correct. The case seems to be one-sided. The witnesses on both sides prove the plaintiff's claim. Such being the case, it is useless to remand it to the Lower Appellate Court. As both parties really contested the right of way from the plaintiff's house to the road on the east of defendant's house, there is no reason why the litigation should be prolonged. The interests of justice require that the case should be determined here. The Moonsiff decreed the plaintiff's right of way over plots 4, 3 and 1, but dismissed his claim as to the intervening link plot 2. It is quite clear that unless some path be allowed to the plaintiff leading from plot 1 to 3, the decree would be quite useless to him. The Ameen has found that there was a pathway (ক) leading from plot 3 to 1 and a waste piece of highland (পতিত জমি খাল) up to the public road. In accordance with that finding, we think the decree of the Lower Appellate Court should be reversed and that of the first Court restored with this modification, *viz.*, that in passing from his house the plaintiff is declared entitled to pass over plots 4, 3, ক and 1 and over high-land up to the road running from north to south.

The appeal is decreed with costs of all the Courts.

As the Moonsiff gave a decree which left it to the option of the defendant to give the plaintiff a new pathway on the north of kitta 1st and it is not shewn that he has done that, we declare the plaintiff's right to pathway over plot 1.

The 30th November 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Municipal—Jurisdiction.

In the matter of

Jogesh Chunder Dutt, *Petitioner.*

Baboo Ashootosh Mookerjee for Petitioner.

Case in which the Moonsiff held that the Municipality had expended more money than was necessary in cleaning the petitioner's tank, and the Judge on appeal set aside the Moonsiff's decision and gave the Municipality a decree on the ground that under the law the matter was purely within the discretion of the Municipality.

HELD that even though the rates charged by the Municipality were higher than those which could be obtained by other persons, that was no ground for the interference of the High Court.

Jackson, J.—THIS is an application asking us to interfere with a decision of the Additional Judge of Hooghly passed on appeal in a case brought by the Chairman of the Municipal Commissioners of Howrah against the petitioner "for a certain sum of money alleged to be due to the Howrah Municipality on account of expenses incurred in cleaning a tank belonging to the petitioner."

The facts are briefly as follows:—

The Municipality of Howrah brought this suit against the petitioner Jogesh Chunder Dutt for expenses incurred by

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them in cleaning and setting in order a large tank of about 100 square feet. The amount claimed was rupees 300, and it is admitted by the petitioner's vakeel that no special appeal will therefore lie.

The case first came on before the Moonsiff of Sulkea, who was of opinion that the Municipality had expended more money than was necessary, inasmuch as they had dug the tank to a depth of 10 feet, whereas, as the Moonsiff thought, 8 feet would have been sufficient; inasmuch also as the works had extended into the rains, as no detailed account of some petty expenses was given, and as the rates charged were, he considered, too high; and generally, the Moonsiff, without apparently very much reason or justice, was of opinion that the Overseer of the Municipality had overcharged the expenses, and as *he* had prepared the bill, and expended the amount, he, the Moonsiff, could not trust him.

The case then went on appeal before the Additional Judge of Hooghly. The Additional Judge was of opinion that it was impossible to decide whether the tank should have been dug 8 feet or 10 feet, and whether it required "ramming and levelling," or works of that description. As to the rates the Additional Judge does not seem to be satisfied that the rates charged were not those paid by the Municipality; and that as regards the extension of the works into the rains, he says that it was owing to the neglect of the defendant in carrying on the works notwithstanding that repeated notices had been served upon him.

The Judge was of opinion that as to all such matters the Municipality have a discretion both as to the objects upon which they should proceed, and as to the manner in which they should do so. He says that under the law the Municipal Commissioners had authority to enter into the premises where the tank was situated and to do all acts that they should think necessary as to putting it in proper order. Thus a very wide discretion was given to the Municipal Commissioners, and the Judge says that they have not, in his opinion, exceeded that discretion in the present case, or expended more money than was necessary in the repairs of the tank; and he therefore set aside the decision of the Moonsiff and gave the Municipality a decree.

The Judge says:—"I think the Civil Courts are hardly competent to decide that "the tank should be dug to the depth of "eight, and not ten, feet, and that there "should be turfing but no ramming, or "ramming but no levelling. These are all "details connected with the work of clean-"ing the tank, and the Municipal Commis-"sioners have, in the exercise of their "discretion, considered these works to be "necessary in cleaning the defendant's tank. "In the same way the Court cannot ex-"amine the charges made by the Commis-"sioners. All that can be done is to "enquire if the sums sued for have actually "been expended by the Commissioners, "for the law says that 'the expense incurred "thereby shall be paid by the owner or "occupier of such premises.' It is proved "that they have been paid by the Commis-"sioners; the defendant is admittedly "owner of the tank, and is bound by law "to pay them." Upon these grounds, the Judge set aside the decision of the Moonsiff and made a decree in favor of the Commissioners.

It may be true, as urged before us, that the rates charged by the Municipality are higher than those which could be obtained by other persons; but this is no ground for our interference, and we accordingly reject this application.

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The 1st December 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Compensation in shape of rent—Limitation.

Cases Nos. 734 and 735 of 1871.

Special Appeals from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 6th February 1871, *reversing a decision of the Moonsiff of Sitamadhy, dated the* 18*th August* 1870.

Mussamut Kishenbutty Misrain (Plaintiff) *Appellant,*

versus

Mr. Roberts and others (Defendants) *Respondents.*

Baboos Nil Madhub Bose and *Mohesh Chunder Chowdhry* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A suit to make the defendant liable for compensation in the shape of rent for the land which he held in the name of his servant, is not a suit for rent under Act VIII of 1869 (B. C.) and is subject to the six years limitation prescribed by Clause 16 Section 1 Act XIV of 1859.

Loch, J.—THE plaintiff, special appellant before us, brought two suits against Mr. Hickie and one Hunooman Pershad Singh, to recover rent on a kabooleut in the name of the second defendant, the first was for arrears of rent from 1271 up to the *kist* of Bysack 1273, and the second for arrears of rent from 1273 to 1275.

The first suit was originally instituted in the Collector's Court under the provisions of Act X of 1859. A decree having been given by the first Court against both the defendants, an appeal was preferred to the Judge, who held that as the relationship of landlord and tenant between the plaintiff and Mr. Hickie was not established, the case must be dismissed. On special appeal, it was held by this Court that as the question of Mr. Hickie's liability to rent owing to his having beneficial interest in the property could not be disposed of in the Revenue Court, the case was one which could not be tried under Act X of 1859.

After this decision the plaintiff brought the present suit with the object of making Mr. Hickie liable for rent for the years above stated, and was successful in the first Court. But the Judge set aside the judgment of the Moonsiff, on the ground that this was merely a renewal of the suit for rent which had been disposed of in the former case and dismissed by the High Court.

In special appeal, it is urged that this is a suit to make Mr. Hickie liable for compensation for the use of the land in the shape of rent, which Mr. Hickie through his servant Hunooman Pershad agreed to pay to the plaintiff, and that the Judge is wrong in treating this case as a case instituted under Act VIII of 1869 (B. C.) simply for the purpose of recovering rent.

The respondent in this case raised a plea of limitation as apparent on the face of the plaint, and urged that the arrears from 1271 to 1273, namely, the whole claim in the first case, was barred by limitation under Section 29 Act VIII of 1869 (B. C.) and that also a part of the claim in the other suit was also barred by the same Section.

It appears to me that limitation as prescribed by Section 29 Act VIII of 1869, B. C., does not apply to this suit. The question before us is a mixed question, which, as determined by the High Court, could not be disposed of under Act X of 1859, and if so, it cannot be disposed of under the provisions of Act VIII of 1869, B. C., which law relates merely to the recovery of rent, but must be decided by the Civil Courts under the powers they have of deciding all civil questions between parties. It is clear that suits brought under Act VIII of 1869, B. C., are simple questions of rent, and the relationship between the landlord and tenant is presumed to exist. But the present suit is one which cannot be decided under that Act, because its object is beyond the scope of that law. For this reason, it appears to me that the general law of limitation as provided for in Act XIV of 1859 is applicable to this suit, and that the period prescribed for bringing an action of the present kind would be six years. The case reported in XIII Weekly Reporter, page 390, is very similar to the present.

Then with regard to the form of the suit to which the Judge has objected, we have had the plaint read to us, and we find that it puts forth what are the circumstances of the claim and what the relief the party seeks. It appears to me that the plaint is

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properly drawn up and that it could not in plainer terms ask for the adjudication of the question between the parties, *viz.*, the liability of Mr. Hickie to pay compensation in the shape of rent for the land which he held in the name of Hunooman Pershad.

I think that both the cases should be sent back to the Judge for trial on the merits. The appellant will have his costs of this appeal.

Ainslie, J.—I concur. The Full Bench Judgment reported in II Weekly Reporter, page 21, Act X Rulings, determined that Act X was a special law forming a complete Code by itself for the guidance of the Revenue Courts, and that consequently the provisions of Act XIV of 1859 could not be applied to any suit brought under that Act. Act X of 1859 has been repealed and Act VIII of 1869 (B. C.) is substituted for it. Now, either Act VIII must be a special Code complete in itself or it must be a part of the general law. If it is a special Code, then the contention would be sound that Act XIV of 1859 would not apply to suits governed by Act VIII. But if it is a special Code, then this suit could not be tried under it; for it was held by this Court that this suit could not be tried under Act X of 1859, and the contention which bars the application of Act XIV of 1859 would also limit the operation of Act VIII in the same way that Act X was limited.

Thus it is immaterial for the purposes of this suit whether Act VIII be held to be a special Code complete in itself or not.

If it is a special Code, this suit is not triable under the Act. If it is not a special Code, then there is nothing to bar the application of Section 14 Act XIV of 1859. In the first case, the claim will come under Clause 16 Section 1 Act XIV of 1859; in the second, the extension of time allowed by Section 14 will be claimable, and either way the suit is in time.

The decision reported in XIII Weekly Reporter, page 390, and the decision of the late Mr. Justice Norman in Regular Appeal No. 11 of 1871, delivered on the 16th June last,* appear to me to support this view.

As to the other parts of the case, Baboo Chunder Madhub Ghose for the respondent states that the judgment of the lower Court could not be sustained on the grounds stated by the Judge.

* *Ante* p. 61.

The 1st December 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Execution—Section 230 Act VIII of 1859—Examination of applicant.

In the matter of

Obhoy Churn Dey, *Petitioner,*

versus

Rajendro Coomar Ghose, *Opposite Party.*

Baboo Bungshee Dhur Sein for Petitioner.

Baboo Boodh Sein Singh for Opposite Party.

When an application is made by a party on the ground that he was in possession and that he has been dispossessed in execution of a decree in a suit in which he was not a party, the proper order to be made under Section 230 Act VIII of 1859 is in the first instance to examine the applicant.

Ainslie, J.—THE Moonsiff was wrong in not examining the applicant under Section 230 of the Civil Procedure Code. When an application is made by a party on the ground that he was in possession and that he has been dispossessed in execution of a decree in a suit in which he was not a party, the proper order that should be made under that Section in the first instance is to examine the applicant. Until the applicant is examined, the Court is not in a position to determine whether the proceedings under that Section will lie or not. It may be that the petition does not set forth as fully as it should the whole of the grounds on which the petitioner claims to be heard, but every opportunity should be given to him to add any explanation in his oral examination, and the Court should question him on all points necessary to be considered before the application is refused or admitted. After having received the whole of his explanation, the Court should deal finally with the petition and not before.

The rule is made absolute, and the Moonsiff is directed to examine the applicant and then to proceed with the case according to the provisions of Section 230.

Parties to bear their own costs respectively.

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The 5th October 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Appeal to Privy Council—Security.

In the matter of

Burra Lall (Appellant to England) *Petitioner,*

versus

The Court of Wards (Respondent to England) *Opposite Party.*

Mr. R. T. Allan for Petitioner.

Mr. H. Bell for Opposite Party.

Application for decree-holder pending decision of appeal to the Privy Council to give security refused; Ainslie, J., following the Full Bench Ruling at page 111, VI W. R., Miscellaneous Rulings, and Paul, J. (whilst declining to follow that ruling) considering the application premature because merely put on the file of the High Court without the appeal being admitted.

A RULE *nisi* was obtained on the 3rd instant by the petitioner for the Court of Wards, decree-holder, to show cause why the said decree-holder should not, pending the decision of the appeal to the Privy Council, be called upon to give security, to the satisfaction of the Lower Court, before executing the decree of the High Court, for the due performance of such order or decree as the Privy Council might make on the petitioner's petition of appeal.

Mr. Bell appeared to show cause against the rule.

The judgment of the High Court was delivered as follows:—

Ainslie, J.—It appears to me that this rule must be discharged. It is not necessary to enter into the question as to whether the appeal to the Privy Council is to be treated as pending or not. The point now before us has been settled by the Full Bench Ruling reported at page 111 of the 6th Weekly Reporter, Miscellaneous Rulings. That case is exactly on all fours with the present case, and therefore following that decision I am of opinion that the application to call upon the Court of Wards to give security ought to be refused.

Paul, J.—I am also of opinion that the rule ought to be discharged, but upon different grounds. I must say, although it may appear somewhat arrogant on my part, that I cannot follow the decision of the Full Bench reported at page 111 of the 6th Weekly Reporter, Miscellaneous Rulings; because, having thought over it a great many times, I am quite convinced that that is not the proper interpretation of Regulation XVI of 1797.

Mr. Bell's client who got the decree of the High Court has already obtained an order for execution of the decree unaccompanied by any condition that he should give security. When he applied for that order there was clearly no appeal pending. I am not called on to decide whether that order was right. At present the application to appeal to the Privy Council has been merely put on the file of this Court, but the appeal has not been admitted. It is possible that the appeal may not be admitted, and it is also possible that the appeal may not be prosecuted.

I therefore hold that under these circumstances the provisions of Section 4 of Regulation XVI of 1797 do not apply, and therefore this application being premature must be refused.

The 24th November 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Permanent Settlement — Surburakaree Tenures—Section 15 Act X of 1859.

Cases Nos. 481 and 482 of 1871 under Act X of 1859.

Special Appeals from a decision passed by the Judge of Cuttack, dated the 6th December 1870, *reversing a decision of the Assistant Collector of that District, dated the 27th September* 1870.

Sudanundo Mytee (Defendant) *Appellant,*

versus

Nowruttun Mytee and others (Plaintiffs) *Respondents.*

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Baboos Hem Chunder Banerjee and *Mohendro Lall Mitter* for Appellant.

Baboo Obhoy Churn Bose for Respondents.

It is not necessary in a suit coming under Act X of 1859 to prove that the land to which the suit relates has been the subject of a permanent settlement.

A surburakaree tenure is a permanent transferable tenure liable to enhancement of rent under Section 15 of that Act.

Jackson, J.—THIS was a suit arising out of a notice issued by the defendant upon the plaintiff under Act X of 1859 to enhance the rent of his tenure. The plaintiff, on receiving the notice, came into Court, under the provisions of Section 14 of the Act, to contest the right of the defendant to enhance. The notice has described the plaintiff as being a tenant-at-will without any rights. The plaintiff sought to contest the claim on the ground that he held the land which it was sought to have enhanced as a portion of a surburakaree tenure, that he held only a one-sixth share of that tenure, that his family had held the tenure from the time of the Mahrattas before the country had been annexed by the British Government, and that consequently the rent of the tenure was not enhancible.

In answer to the suit, the defendant again alleged that the plaintiff was a common ryot at will, that he had no surburakaree rights whatever, that other persons had held his tenure before the plaintiff, and that even the plaintiff's documents showed that there had been a variation of the rent. The issue upon which the parties went to trial in the lower Court was as to whether the plaintiff had made out the fact that this was a surburakaree tenure; and although the first Court came to a conclusion adverse to the plaintiff, the Judge on appeal was satisfied that the plaintiff had clearly made out that his tenure had been long in existence and had for the last 20 years paid at the same rate of rent, and that the plaintiff was consequently entitled to the presumptions of Sections 15 and 16 Act X of 1859, namely, that he held his tenure as if he had held it at the rent now paid from the time of the permanent settlement, and that the defendant therefore was unable to enhance the rent.

The special appeal to this Court was commenced by urging that, as no permanent settlement had been carried out in the district of Cuttack, the provisions of Act X of 1859 did not apply to Cuttack. The express words of Section 15 Act X of 1859 include any person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the ryots, who, in the provinces of Bengal, Behar, Orissa, and Benares holds a talook or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the permanent settlement. The word Orissa would include the district of Cuttack under ordinary circumstances, but it is said that the words "from the time of the permanent settlement" must confine the operation of these provisions to those districts of Orissa where a permanent settlement has taken place. An illustration was mentioned with reference to this argument from the Soonderbuns which have not been included in the permanent settlement of Bengal; and it was urged that a ryot who held lands from the time of the permanent settlement in the Soonderbuns would not be entitled to the presumption of Section 4 Act X of 1859. There can, however, be very little doubt that as regards the whole of the province of Bengal the law applicable to all suits for enhancement of rent is Act X of 1859, and that any ryot, even in the Soonderbuns, might claim the benefit of the presumption of Section 4 of that Act, or any under-tenure holder might claim the benefit of the presumptions of Sections 15 and 16 of the Act.

The law, Act X of 1859, is applicable to all the provinces mentioned in the law, and it is not necessary in suits coming under it to prove that the land to which the suit relates has been the subject of a permanent settlement. It is said that it is impossible to ascertain when the permanent settlement of Cuttack took place, as in fact there has been no such settlement. We do not think it necessary in this case finally to decide this question, as the plaintiff is fully entitled to a decree on the merits.

The next argument which has been put before us is that even if the provisions of Sections 15 and 16 of Act X of 1859 apply to this case, still the plaintiff has not proved that he has a permanent transferable tenure, and he has not proved that he has held that tenure at an unvaried rate for 20 years prior to the institution of the suit, but that one of his documents proved that there had been a change in the rent. There does not appear to have been any contention in the lower Court that, if the plaintiff could make out that he held a surburakaree tenure, his

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tenure was one not coming within the provisions of Sections 15 of Act X. The plaintiff has produced very good evidence to show that long before the defendant had any connection whatever with the land (he being a late purchaser and lease-holder) so far back as 30 years ago his family put forward a claim to his surburakaree tenure. The first documents in proof of this tenure produced by the plaintiff are the records of the settlement of 1842. Claims were then put forward by the ancestor of the present plaintiff who held these lands as surburakar. These claims were not enquired into, and no decision was come to upon them, but the mere fact that this claim was then put forward and recorded in the survey record is strong corroboration of the then existence of the plaintiff's tenure.

In addition to this, there is another document, namely, an arbitration award which was passed in a contest between the suburakar on the one hand and the landlord on the other. The question in dispute was the amount of rent which should be paid for this tenure in lieu of the kahans of cowries which had been fixed originally to be the rent. The very circumstance of the rent being fixed originally in cowries is very strong evidence that this tenure was a very old one. This arbitration award in 1251 can leave no doubt in any person's mind that there was admittedly a surburakaree tenure and that the rent which was formerly paid in cowries was by that arbitration award changed into a money rent.

The fact, then, of the surburakaree tenure has been found by the Judge upon this evidence, and it does not appear that the defendant, the landlord, has given any evidence which could satisfy the Judge that the plaintiff was holding a new and lately acquired tenure which had formerly been in the possession of other person; indeed the landlord has not attempted to give the usual evidence to prove such facts, and there can be no reason to interfere in any way with the decision of the Judge on the question that this was a surburakaree tenure. But it is said that this tenure is not one of the tenures mentioned in Section 15 of Act X. In the first place, there appears to have been no contest of this kind in the lower Court and no such question was raised. Surburakaree tenures are well known tenures in Cuttack. The reports of Messrs. Mills and Ricketts, two officers of Government, who had perhaps a more intimate acquaintance with the tenures of Cuttack than any other Civilians, have been produced in Court, and in them these surburakaree tenures are alluded to amongst the other mokururee tenures of the province. It is not said that a surburakaree tenure cannot be enhanced, but there seems to be no doubt that they are permanent and transferable tenures which can, if proper measures are taken at the proper time, have their rents enhanced. There is every reason to believe that this tenure has descended from the ancestors of the present plaintiff for some generations down to the present holders of it. It is undoubtedly a permanent hereditary tenure, and there seems, as it stands at present, every reason to conclude that such a tenure would be transferable; and certainly on the other hand the defendant not only has not attempted to object that a surburakaree tenure is not transferable, but also has not attempted to prove the fact. In addition to this, however, the very circumstance that the defendant is here seeking to enhance a 2 annas share of a surburakaree tenure instead of enhancing the whole of the tenure is sufficient ground for decreeing the plaintiff's suit. If the defendant had proved that the plaintiff was a pahee ryot, *i. e.*, a ryot at will, of course this objection as regards the surburakaree would have been of no avail; but the plaintiff having proved that he holds a portion only of a surburakaree tenure, the Judge was quite right to dismiss the suit to enhance the rent of a portion of the tenure.

The special appeal to this Court is dismissed with costs.

The 27th November 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Joint Ancestral Property—Recovery of possession—Separation—Costs.

Case No. 115 of 1871.

Regular Appeal from a decision passed by the Judge of West-Burdwan, dated the 27th April 1871.

Shib Pershad Chuckerbutty and another (Defendants) *Appellants,*

versus

Gunga Monee Debee (Plaintiff) *Respondent.*

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Baboo Nil Madhub Sein for Appellants.

Baboos Bama Churn Banerjee and *Anund Chunder Ghossal* for Respondent.

Suit by a brother's widow against his brothers to recover his share of joint ancestral property. Defendants pleaded separation, self-acquisition, &c. HELD that, in the absence of some written record made of the terms of the separation at the time, the plea of separation was most improbable; and that, considering there was a certain nucleus of ancestral property from which a beginning might have been made, while on the other hand there was no evidence of self-acquisition by the defendants, the only inference was that the property had been acquired from the ancestral funds.

Although the widow was unable to satisfy the Judge below as to each item of property for which she sued, and did not obtain a decree for the full amount claimed, yet she was held entitled to recover the whole of the costs incurred by her in a suit into which she had been forced by the defendants for the recovery of her property.

Jackson, J.—THIS is an appeal from the Judge of Bancoorah (West-Burdwan). It was a suit brought by the plaintiff in *formâ pauperis*, as being the widow of one Bishonath Chuckerbutty to recover lands, cash, and jewels belonging to the share of her husband Bishonath Chuckerbutty's estate. The allegation was that her father-in-law, Huree Pershad Chuckerbutty, had three sons, Ramsoonder Chuckerbutty, Shib Pershad Chuckerbutty, and Bishonath Chuckerbutty; that they all lived jointly and held joint possession of the ancestral estate and acquired fresh estates from time to time with the common funds and had joint dealings; that in Aghrain 1262 her husband died, but subsequently to that the whole family still remained joint, until in Bhadro 1271 her husband's brothers turned her out of the house; that subsequently she was again allowed to join the family, but was again turned out in Magh 1276, and upon that dispossession she has based the present claim.

The defendants' answer is that the three brothers divided in the year 1256, Bishonath separating himself from the other two brothers; that certain of the properties which the plaintiff claims were then made over wholly to the plaintiff's husband, while other portions of the property still remained joint, each of the three brothers recovering a one-third share of the proceeds; and other portions of the family estate fell to the lot of the remaining two brothers, who, up to the present time, have remained joint. As regards the jewels sued for, the defendants answer that they had none belonging to the joint family; and as regards the other articles and the money which are sued for, they admit that the money is due to them, but state that the plaintiff has no connection with it.

The Judge has decided upon the evidence before him that the plaintiff has made out her case, that he distrusts the evidence adduced by the defendants as to the division in 1256, and he seems to be of opinion that the parties have all along lived jointly until the last few years when the plaintiff was dispossessed by the defendant.

The appeal to us is on this point, namely, that in 1256 there was a division of the property, and that the plaintiff's husband Bishonath Chuckerbutty then left the joint family, and that consequently he or his widow is not entitled to any property which was acquired subsequently to that date, and that whatever has been acquired subsequently has been acquired by the separate funds of the two brothers Ram Soonder and Shib Pershad Chuckerbutty.

The pleader for the appellants has gone through the evidence in this case, and certainly the witnesses for the plaintiff seem entitled to more credit than those cited by the defendants. The witnesses for the plaintiff prove that the plaintiff has all along lived in the same house in commensality with the defendants, and depose to the fact that she has been receiving her share of the profits of the joint property. The evidence put forward by the plaintiff is sufficient, unless it can be clearly shewn that there was a division in 1256, and such a division as has been pointed out by the defendants. In the first place, there seems to have been a large quantity of small pieces of landed property which had to be divided if the separation took place, as alleged, in 1256, and it seems very improbable that there should not have been any written record kept of what property was given away to the brother who left the joint family. The story is that there was no written record made of the terms of the separation at the time. This story is under the circumstances very improbable, as it is almost impossible that the title of the brother who separated from the others could have been substantiated in respect of the property which he obtained unless some written record was kept as to the manner in which the separation was carried into effect. There seems to be no doubt that this brother and his widow have all along lived in the same house since his death with the other brothers, and even on the defendants' own statement

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it would appear that as regards a very large portion of the landed property each of the three brothers has been obtaining a one-third share of the profits from the ryots. In addition to this, as regards the specific portions of land which the defendants state were made over to the plaintiff's husband as his share at the time of the separation, when the witnesses for the defendants were examined regarding these specific portions of land, they do not confirm the defendants' story that these lands belong wholly to the plaintiff, but they aver that the plaintiff even for these lands is only obtaining a one-third share of the produce from the ryots. There are only three or four plots which are asserted by the defendants to have been made over wholly to the plaintiff's husband, and when the witnesses for the defendants do not confirm the defendants' story as regards two or three of these, it certainly throws the greatest suspicion on the defendants' case. As the evidence stands, it seems that it would be impossible for the Judge to have given any other decision than that which he has given.

As regards the second part of the defendants' case, namely, that even supposing that the properties had been all along joint and undivided, still it is for the plaintiff to show that the properties which have been acquired in the name of the brother Shib Pershad were acquired from joint funds and from the proceeds of the joint property. The vakeel for the appellants has pointed out to us that, even on the plaintiff's own valuation, the admitted nucleus of ancestral property would not have given a profit of more than 56 rupees which would be hardly sufficient for the expenses of the family, and certainly would leave no balance with which to acquire property; but there has been no evidence adduced by the defendants as to the real amount of profits which was obtainable from these lands. The acquisitions seem to have been made from time to time with very small sums of money, and some of them may have been obtained even without the expenditure of money; and certainly, considering that there was a certain nucleus of ancestral property from which a beginning might have been made, and that on the other hand there is no evidence whatever to show that the defendants acquired any special profits by any exertions of their own, the only inference which can follow is that this property was acquired from the ancestral funds; all the probabilities seem to turn in that direction, and in the absence of any evidence on the other hand, the Judge was right to hold that the subsequent acquisitions which it is admitted were not special acquisitions by Shib Pershad alone, and which are admitted to have been acquisitions for the two joint brothers, were really made for the joint family and with the common funds.

Lastly, it is said that the Judge was wrong in giving the plaintiff a decree for her full costs when the whole amount of the claim was not decreed. Looking to the whole of the circumstances of the case, we think that the Judge was right to give the plaintiff her costs. There seems to be no doubt upon the evidence that the plaintiff, who, as a widow, is entitled to look to these defendants to support her and maintain her, has been turned out of her house and deprived of her share in the property by them; and even though she has not been able to satisfy the Judge as to each item of property for which she sued, it is right that she should recover the whole of the costs which she has incurred in a suit into which she was forced by the defendants for the recovery of her property.

We, therefore, affirm the decision of the lower Court, and dismiss this appeal with costs.

Kemp, J.—I concur in this judgment. Something has been made in the course of the argument of the fact that the nucleus of ancestral property in this case is a very small one, and it has been urged that such a nucleus was not sufficient to account for the properties in suit having been acquired with the joint funds of the family. I observe on turning to the documents filed by the defendants in support of their contention as to the property being their self-acquired property, that there is one deed of the year 1862, one deed of 1866, and one deed of 1869, and the aggregate consideration money of these three deeds amounts only to 222 rupees. Looking to the fact that the family had a karbar, and that the plaintiff, the widow, has given a detailed account not only of the debts due to the family but also the names of the debtors and the amount to a fraction of a rupee that each man owed, I see nothing improbable in these properties having been acquired with the joint funds of the family, and I entirely concur in the judgment just delivered.

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The 1st December 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Ameen (Powers of)—Mesne Profits—Mode of calculation—Decree for costs (amendent of in appeal).

Case No. 172 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Beerbhoom, dated the 6th March 1871.

Bijoy Gobind Naik and others (Judgment-debtors) *Appellants,*

versus

Kalee Prosunno Naik and others (Decree-holders) *Respondents.*

Baboo Grija Sunkur Moojoomdar for Appellants.

Baboos Chunder Madhub Ghose and *Woopendro Chunder Bose* for Respondents.

An Ameen, when directed to make enquiry as to mesne profits, ought not, in the execution stage of a suit, to enter into enquiries as to dates of dispossession which must be taken to have been determined by the decree.

The mode of calculating mesne profits in cases of decrees for and against each of the parties, is to calculate and rateably divide them and then to allow a set-off to the extent of the profits actually received by each sharer, the deficit in each year being made good by the party who received in excess of his share.

A decree which contains a distinct specification of costs, whether rightly or wrongly calculated, cannot be amended in appeal.

Ainslie, J.—* * * * * * * * * * * *

We now come to the question of mesne profits.

The first great objection is to the setting aside of the report of the first Ameen Hurish Chunder. It seems clear that this Ameen went beyond what he could do in the execution stage of the suit in entering into enquiries as to dates of dispossession which must be taken to have been determined by the decree, and it is difficult to conceive how the enquiry should have resulted in a finding so completely in favor of the defendant and against the plaintiff who must be taken to have got some relief by the decree—whereas according to Hurish Chunder's report the defendant is the person who gets the benefit of the decree not in the ordinary way in which a defendant gets the advantage of the dismissal of a suit, but as if he were the party coming to the Court for relief. It would be difficult to persuade us that such a complete inversion of the position of the parties was the result of the submission to arbitration, and we think the Subordinate Judge was right in rejecting this report *in toto* and using the materials furnished by the award itself as the basis of his calculation as far as they would go and directing an enquiry only as to those portions of the lands in respect of which the award did not supply materials for assessing the mesne profits.

The next point is that the profits have been calculated from 1246 for the plaintiff and and only from 1863 for the defendant. The respondent contends that this was proper as he had been kept out of possession of the bulk of the lands from 1246, and there was no wrongful holding by him as against the defendant. But looking at the mode in which the case had been disposed of by the award, and taking this, as the parties have all along treated it, to contain decrees for as well as against each of the parties, we are of opinion that all must be put on the same footing. The entire profits should be calculated and divided rateably, and then there should be a set-off to the extent of the profits actually received by each sharer, and the deficit in each year in any share must be made good by the party who received in excess of his share. It may be that the plaintiff was not wrongfully holding certain lands which by the award have passed to defendant, but then *pro tanto* defendant's holding was not wrongful in respect of the lands which have passed by exchange for these : the wrongful holding for which the defendant is liable is limited to the lands which he held in excess of his share, and there is no foundation in equity for plaintiff's

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claim to retain all he received up to date of decree from the lands which have now passed to defendant, and also to receive the entire profits of the lands which have come to him under the decree, from date of dispossession, without making any allowance for the first mentioned receipts.

On the other hand, the cross-appeal must also be allowed. The respondent shows that by the 43rd para. of the award all parties agreed to accept Pureshnath's accounts as true. These accounts, besides the nij jote lands, also exhibit ijmalee lands yielding an annual rent of rupees 316 of which Huree Pershad received 157 and Kalee Prosunno and Pureshnath received rupees 159. The share of Huree Pershad being rupees 6-16th he ought to have received rupees 118. So that he was in the annual receipt of rupees 38 over and above his share.

In respect of costs, the appellant seeks to amend the original decree, but this cannot be done. The decree contains a distinct specification of costs, and whether rightly or wrongly calculated, it must be taken as conclusive: there is no provision for re-calculating the costs after the assessment of the mesne profits.

He further objects to the respondent having been allowed costs on the previous proceedings taken in execution which were stopped on the ground of misjoinder. Whether the order of 18th December 1869 was correct or not, it is beyond dispute that the costs incurred were *bonâ fide* incurred for the purpose of prosecuting the execution of the decree, and in the course of this appeal the appellant has relied upon the report of the Ameen which was made in that abortive application. We see no reason to interfere with the orders of the Subordinate Judge on this point.

The cross-appeal on costs will also be dismissed—in the mode in which the award has been dealt with, to which it is too late to object now—each party is entitled to recover the costs he has incurred.

The Subordinate Judge will revise his proceedings with reference to the above remarks. No order for costs.

The 7th December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Parties—Evidence (refusal to give).

Case No. 765 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 9th March 1871, *reversing a decision of the Deputy Collector of that District, dated the* 31*st May* 1870.

Sreemutty Buroda Moyee Dossee and another (Plaintiffs) *Appellants,*

versus

Rughoonath Chuckerbutty and another (Defendants) *Respondents.*

Baboo Jugendro Nath Bose for Appellants.
No one for Respondents.

Where the defendant having, when called upon by the plaintiff to give evidence, persistently refused to do so, and the first Court came to the conclusion that the case set up by the plaintiff was true, and the Lower Appellate Court reversed the first Court's decision without taking any notice of that point, the Lower Appellate Court's decision was reversed as wrong in law, and that of the first Court restored.

Mitter, J.—This was a suit for arrears of rent at the rate of rupees 134-1-9-pies. The defence set up was that the tenure was held at a jumma of rupees 126-3-9 pies only.

The Court of first instance found that although the defendant's jumma was originally one of rupees 126-3-9 pies, he, the defendant, agreed some 20 years ago to pay an increase of 1 anna in the rupee, and that he has ever since paid his rent at that rate, that is to say, at the rate of rupees 134-1-9 pies, as alleged by the plaintiff.

Against this decision, the defendant appealed to the Judge, and that officer being of opinion that the increase alleged to have been paid by the defendant was in the nature of an *abwab*, reversed the decision of the Court of first instance and dismissed the plaintiff's suit.

We are of opinion that the Judge's decision is wrong in law. In the first place, there is no evidence to show that the increase which the defendant had agreed to pay was not an

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increase upon the rent originally payable by him, but was intended as a mere payment in the shape of *abwab*. In the next place, it appears that the defendant was called upon by the plaintiff to give evidence in the case; but he persistently refused to do so, and the first Court was therefore fully justified in coming to the conclusion that the case set up by the plaintiff was true. The Judge has not taken any notice of this point.

The defendant has not thought proper to appear in this Court, but the service of summons has been duly proved.

The decision of the Judge is therefore set aside and that of the first Court restored with costs.

The 7th December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Kabooleut—Suit for.

Case No. 718 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 15th February 1871, *reversing a decision of the Deputy Collector of Ranaghat, dated the 23rd February* 1870.

Sreemunto Koondoo (Plaintiff) *Appellant,*

versus

Brijonath Paul Chowdhry and another (Defendants) *Respondents.*

Baboo Sreenath Dass for Appellant.

Baboos Gopal Lall Mitter and *Tarucknath Sein* for Respondents.

No suit for a kabooleut can lie where the plaintiff has never received any rent from the defendant nor has there been any contract between the two to pay and receive rent, and where therefore there is no relationship of landlord and tenant between them.

Glover, J.—THERE is no ground for this special appeal. Even supposing, for the sake of argument, that the Judge was wrong in throwing the case out on the question of whether or not a *pottah* had been tendered, it is clear from the plaintiff's own case that he had no right to bring this suit, and consequently there would be no use in remanding it for a fresh decision. On the face of the plaint, it is admitted that the plaintiff has never received any rent from the defendant; nor has there been any contract between the two to pay and receive rent; there is therefore no relationship of landlord and tenant between them, and no suit for a kabooleut will lie.

We dismiss the special appeal with costs.

The 8th December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution—Limitation—Keeping decree alive.

Case No. 139 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 22nd February 1871, *affirming an order of the Sudder Moonsiff of that District, dated the 27th June* 1870.

Uddoyto Churn Saboo (Decree-holder) *Appellant,*

versus

Ram Dhun Roy (Judgment-debtor) *Respondent.*

Baboos Doorga Mohun Dass and *Lucklee Churn Bose* for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

Case in which it was held that, before summarily deciding that the claim of the decree-holder was barred and the proceedings taken by him from time to time, apparently with the view to enforce the decree, were not *bonâ fide*, the Judge ought to have given the decree-holder an opportunity of proving that his proceedings were *bonâ fide*.

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Kemp, J.—THE decree-holder is the special appellant in this case. It appears that the decree which is dated the 17th February 1862 was passed on a solehnama between the parties. From 1862 down to the 11th of March 1870, which is the date of the last application made by the decree-holder, no less than six applications were made by the decree-holder to enforce his decree, which, as already observed, was arrived at on an amicable arrangement between the parties. Amongst these various proceedings taken by the decree-holder we find that in 1864, on the 21st of September, notice was issued and an attachment of the debtor's property was made. A claim was instituted by the judgment-debtor which appears to have been successful, and on the 27th of March 1865, the case was struck off. Again in 1866, in March, a notice was served, attachment was taken out, and again an objection was made by the judgment-debtor, and the property was released.

Subsequently, in April 1867, notice was issued and an application made for the arrest of the judgment-debtor, but owing to the non-deposit of Tulubanah no process was taken out. Again in April 1869, notice was issued and on the 12th of June 1869, the case was struck off. The present or last application is made on the 11th of March 1870. The Judge assumes every thing against the decree-holder, although the inferences, looking at his conduct as detailed above, are rather in his favor. This is a case in which the Judge ought to have called upon the decree-holder, before deciding that the proceedings taken by him from time to time, apparently with the view to enforce the decree, were not *bonâ fide*, to explain why he did not proceed against the property and person of the debtor. It is very probable that having been foiled twice after attaching the property of the judgment-debtor, there remained nothing for him to attach, or that there was nothing, within his knowledge, belonging to the judgment-debtor which he could attach. At any rate we think this is a case in which, before summarily deciding that the claim of the decree-holder was barred, the Judge ought to have given the decree-holder an opportunity of proving that his proceedings were *bonâ fide*.

We, therefore, remand the case for the Judge to re-decide it with reference to the above remarks. Costs to follow the result.

The 11th December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Interest—Injunction—Registered Bonds.

Cases Nos. 174 and 175 of 1871.

Regular Appeals from a decision passed by the First Subordinate Judge of Hooghly, dated the 9th June 1871.

Ram Dass Gossamee (Defendant) *Appellant,*

versus

Poosunno Moyee Dossee (Plaintiff) *Respondent.*

Baboo Doorga Mohun Dass and *Bama-Churn Banerjee* for Appellant.

Baboo Grish Chunder Ghose for Respondent.

The defendant was invited, by an injunction issued upon him in another suit, to deposit in Court the money admittedly due under the bonds now sued upon, but having refused to do so, was held liable to pay interest from the date of that injunction.

Where a registered bond provided for payment of interest between the date upon which the bond fell due and the date upon which enforcement was applied for, the bond was construed strictly against the debtor.

Kemp, J.—THESE are two regular appeals from the decision of Baboo Grish Chunder Ghose, Officiating Subordinate Judge of Hooghly. The defendant is the appellant in both cases. It appears that two suits were brought by the plaintiff, respondent, on two separate bonds. The execution of the bonds is admitted by the appellant, the judgment-debtor. The Court below has given the plaintiff a decree. The bonds were registered under the provisions of Section 52 Act XX of 1866, and therefore could be enforced as a decree in a suit.

The points taken in appeal are 1st.—That as an injunction had been issued upon the defendant in the suit of one Wooma-

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moyee Debee, which suit is numbered 150 of 1871, forbidding the appellant to pay the monies due under the bonds, the appellant is not liable to pay interest from the date of that injunction.

The next point taken is that as this is a registered bond and capable of enforcement in execution as a decree of Court, no interest is payable on the bond after the date on which the bond fell due according to the terms thereof, and in support of this latter contention a decision to be found in Volume X, Weekly Reporter, page 175, is quoted.

With reference to the first point, we find that in the case of Wooma Moyee, to which the defendant, present appellant, is no party, an injunction was issued by the Court under the provisions of Section 92 of Act VIII of 1859. The appellant was invited by that injunction to deposit the money admittedly due under the bonds, into Court. Had he done so, then all claim to interest from the date of that injunction would probably have ceased; but having refused to protect himself as any honest debtor ought to have done by paying what was admittedly due into Court, we think that he is clearly liable to pay the interest which has accrued entirely by his own neglect.

On the 2nd point, as the debt is admitted and the rate of interest is not at all exorbitant, namely, 14 per cent. or some 2 per cent. above the usual rate of interest charged, we think we ought to construe the bond strictly against the judgment-debtor. We find that he is liable to pay such interest as accrued between the date upon which the bond fell due and the date on which enforcement under the provisions of Section 53 of the Registration Act was applied for. The words are :—

"মেয়াদ গতে যদি আসল টাকা পরিশোধ না করি তবে
"তুমি অত্র বন্ধকি তমসুক উচিৎ আদালতে রিতমত
"জারী করিয়া উক্ত আবদ্ধিয় বিষআদি নীলামের দ্বারা
"বিক্রয় করাইয়া সুদ আসল মায় খরচা বেবাক টাকা
"আদায় করিয়া লইবে"।

These words admit of no doubt, and the debtor must pay not only the interest due up to the date upon which the money secured by the bond was due, but interest which has accrued from the date on which the money was due to the date of enforcement.

We, therefore, confirm the decision of the Subordinate Judge, and dismiss both appeals with costs.

The 15th December 1871.

Present:

The Hon'ble E. Jackson, *Judge.*

Estoppel—Judgment—Heirs—Strangers.

Application for Review of Judgment passed by the Hon'ble Justices E. Jackson and Onoocool Chunder Mookerjee, on the 12th August 1871, *in Regular Appeal No.* 21 *of* 1871.

Abdool Guffoor Khan Chowdhry and another, Plaintiffs (Appellants) *Petitioners,*

versus

Golam Nujuf and another, Defendants (Respondents) *Opposite Party.*

Mr. J. W. B. Money for Petitioners.

No one for Opposite Party.

Decisions against one heir are not final or binding against other heirs. Nor are decisions against one person in any way conclusive or binding against other persons who do not derive their title from him and who come into Court upon an independent title or independent rights of their own.

Jackson, J.—The learned Counsel for the petitioners has not satisfied me that I ought to admit a review in this case. I am prepared to admit that if he had made out to my satisfaction either of the points upon which he urged this application, it would have been necessary to admit a review. If it had been shown that the parties in this case were privies to the parties in the former case, of course the former judgment would have been binding against the parties to this case. It would have been an estoppel, and they would not have been able in any way to produce further evidence or to argue against the former judgment. But I am not satisfied that they are privies. They are two sets of heirs to the same party; and in numerous suits in the Courts of this country it has been held that cases or decisions against one heir are not final or binding against other heirs. It seems to me impossible in this country to admit the proposition that decisions against one person are in any way conclusive or binding against other persons who do not derive their title from that one person and who come into Court

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upon an independent title or independent rights of their own. The only case which has been put before me, and which in any way alludes to it, is an English case which is referred to in a note in Smith's Leading Cases, but it is impossible from that note to understand exactly what the point is which is there alluded to; it is very short, and I am not at all prepared to say that the case there is in any way analogous to the case here. It was said that the result of this Court's ruling is that the same Court has decided on one occasion that the deed in suit is false and on another occasion that it is a true deed, but in point of fact the former decision did not decide, as far as this Court was concerned, the fact of the truth or otherwise of the deed then in question. It was a case of special appeal, and the real decision of the question was given by one of the lower Courts. That decision might have been binding if the parties in this case were really privies to the former decision, but in my opinion they were not.

The second point would also be a good ground of review, if clearly made out. The second point is that the contentions as regards these deeds were first, that they were false, and second, that they were invalid under the Mahomedan law; that the lower Court having decided that the deed had already been held to be false, it was therefore unnecessary to go on and try the question of Mahomedan law; that this Court on appeal reversing that decision found the deed to be true, but did not go on to try the question of Mahomedan law.

It does not appear, however, that upon the statements of the parties any questions of Mahomedan law were raised and certainly they are not fixed in the issues. The issue raised is whether the deed is true and valid, but I take it from the proceedings in the case that the meaning of the word valid in the issue was much the same as that of the word true. If upon the statements in the case it was clear that any question of Mahomedan law arose upon it, of course I should have been perfectly willing to have that point tried, but it does not appear that the parties either in the lower Courts or in this Court raised any question of Mahomedan law, nor does it appear to me that any such question arose.

Under these circumstances, I think that this application for review must be rejected.

The 20th September 1871.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Limitation — Execution—Section 20 Act XIV of 1859.

Case No. 215 of 1871.

Miscellaneus Appeal from an order passed by the Officiating Judge of Chittagong, dated the 14th April 1871, *reversing a decision of the Subordinate Judge of that District, dated the 9th February* 1871.

Nittyanund Koondoo (Decree-holder) *Appellant,*

versus

Nugendro Chunder Ghose and another (Judgment-debtors) *Respondents.*

Mr. Woodroffe and *Baboos Chunder Madhub Ghose* and *Aukhil Chunder Sein* for Appellant.

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, and *Bhyrub Chunder Banerjee* for Respondents.

Appeals against orders of the Court charged with the execution of a decree, having the effect of restraining execution or stopping further proceedings, are proceedings coming within the terms of Section 20 Act XIV of 1859.

Phear, J.—THE proceedings that have been brought under our notice in this appeal certainly seem to us to reflect but little credit upon the Courts of Chittagong. It is beyond question that the plaintiff obtained a decree under which the judgment-debtor became liable to pay such an amount by way of wassilat as might be subsequently assessed. This decree was passed just four and thirty years ago. During the whole of this period, the original judgment-creditor or his representatives have continually been seeking to obtain further execution of the decree in the shape of assessment of wassilat directed to be made, and have as continually been foiled by the judgment-debtor, so that up to this moment no steps have in fact been taken by the Court towards effecting the assessment of damages under its own decree.

The Lower Appellate Court speaks of these series of steps as so much harassing litigation prosecuted by the judgment-creditor

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against the judgment-debtor. It is conceivable that this may be so, but certainly at first sight it presented itself to us rather as the natural endeavor of a person, who was entitled under a decree of Court to compensation for the previous loss of his property, to get that compensation assessed and paid to him. However, at any rate, the question which is before us on this special appeal for decision is narrow enough.

Has there been at any time in the course of these proceedings such a gap of time in which the judgment-creditor has made no *bonâ fide* effort to obtain the full fruition of his decree, as causes further execution of the decree to be barred by operation of Section 20 Act XIV of 1859 ?

The only period which the respondent can point to as sufficient for this purpose is a period of time occupied by Jumoona in appealing first to the Lower Appellate Court and then to the High Court against certain orders of the Court charged with the execution of the decree, which she and every body at the time certainly considered had the effect of restraining her execution if not of stopping her further proceedings altogether. It appears that after she commenced these steps of appeal, the Judge who sat in the Lower Appellate Court expressed an opinion that the orders appealed against did not affect Jumoona's right to proceed in execution of the decree. Nevertheless, the expression of that opinion was not a decision, which could have any effect as between the parties in modifying those orders or restricting their operation. It has, however, furnished the ground upon which the Lower Appellate Court in the judgment before us has come to the conclusion that the period occupied by Jumoona in these appeal proceedings was so much lost time, that she need not have taken them, and that she and her present representatives must bear the consequence of so much valuable time having been thrown away.

It appears to us that in this the Lower Appellate Court is wrong. We think that Jumoona had ample justification for endeavouring to get rid of these original orders, and we have no doubt at all that she was perfectly earnest in all that she did for this purpose, and that she was in truth actuated by a sincere desire throughout to keep the decree in force and to get the benefit of it. So that, all these proceedings ought to count in her favor, because it seems to us they were strictly proceedings coming within the terms of Section 20 Act XIV of 1859. That being so, quite irrespective of the merits between the two contending parties, the Judge was wrong in saying that further execution of the decree is barred. His judgment will, therefore, be reversed, and the case must be remanded to him for trial upon the merits. We reserve the question of costs of this appeal.

The 23rd November 1871.

Present;

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Construction—Deed of gift—Appeal.

Case No. 648 of 1871.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 2nd February 1871, affirming a decision of the Subordinate Judge of that District, dated the 31st August 1870.

Kalee Doss Roy and others (Defendants) *Appellants*,

versus

Khiroda Soonduree Debia (Plaintiff) *Respondent*.

Baboo Sreenath Doss for Appellants.

Baboo Tarucknath Dutt for Respondent.

Where from the whole tenor of a deed of gift it appeared that the real intention of the donor was to pass all her property, qualifying words used in the deed were held not to control its operation.

A finding of a Court of first instance not appealed against cannot be interfered with in appeal.

Couch, C. J.—We think the document must be taken as passing the whole of the property which Mussamut Ashrufoonissa had, including the *putnee* talooks, although they were acquired previously to the gift by her husband to her of the zemindaree. The document, we think, shews very clearly an intention on her part to dispose of the whole of her property. It states that she is about to make a pilgrimage to Mecca, and gives that as a reason for her making over the property to her adopted son ; and it is not probable that under such circumstances she would reserve to herself these *putnee* ta-

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looks. Of course, although it might have been the intention of the lady to part with the whole of her property, and make it over to Baker Ali, still if the document itself did not contain words sufficient to pass the whole of the property, the intention would not be carried. But this document appears to contain words quite sufficient to pass all that she possessed; and it may well be that these two *putnee talooks* are not named in it in the same way as the other *putnee talooks* were named, because they were part of the zemindaree of which she was herself the proprietor, having obtained it from her husband. We think we should be looking at the document too particularly if we considered that, because the *putnee talooks* were not mentioned in it, it was not the intention of the lady that they should pass, when we see other parts of the document express an intention that the whole of her property should go to her adopted son. We must look at the whole of the instrument, and, in construing it, we must not be too critical, but must infer from the whole tenor of the instrument, what the real intention of the lady was, that is to say, whether she meant to place in the hands of her adopted son, the whole of her property, she being about to make a pilgrimage to Mecca.

If then the whole of the property passed to Baker Ali, the only question is, whether the mortgage which he made was sufficient to pass this property to the defendant, the present appellant. The mortgage, if it contained words sufficient to pass this property, would not be qualified by any statement that the property had come to her from her husband. That would not be sufficient to control its operation, and then there is to our minds a material circumstance that she was a party to this mortgage in this way, that she entered into a covenant to pay the mortgage money if Baker Ali should fail to do so, and if the property was not sufficient for the purpose. Moreover, there is a recital in the covenant which was executed on the same day as the gift, 10th Assin 1268, that she had no right or possession in the property. Now a statement by her that she had no right or possession in the property not only shews that at that time she did not consider that she was retaining the *putnee talooks*, but it amounts to a representation to the mortgagee by her and by Baker Ali, that the entire interest in the property had become vested in him, and that he was competent to mortgage it; and the instrument professed to pass under the mortgage the entire interest in the property, not reserving these two *putnee talooks*.

The fair construction of these documents is, that the whole of the property passed, in the first instance, to Baker Ali, and then, from him to the mortgagee; and if that is the fair meaning of the documents, no statement of the nature alluded to could control their operation.

It is quite possible that, in order to get something out of the hands of the mortgagee, acts may have been done which would give the appearance of her having had possession of the *putnee talooks*. It is just possible, although we do not say that it is so, but it is possible that the judgment of the High Court in the other case may have suggested some of the evidence which has been adduced in this case. But the document upon which the Judge has placed reliance, *viz.*, the acknowledgment by Baker Ali, appears to be of a suspicious character. It has been found by the first Court not to be a genuine document. It fits in remarkably, no doubt, with the circumstances of the case, in one view, namely, that the *putnee talooks* were excepted out of the gift to Baker Ali, and so it would if it were not a genuine document. We do not think that the Judge was justified in coming to the conclusion that he did that that was a genuine instrument. He seems upon not a serious consideration of that question to have held that the instrument was genuine. He seems to have assumed that the circumstances of the case were of a particular nature, and then to have come to the conclusion that this was a genuine instrument, because it fitted in with those circumstances. But if the circumstances were of a different nature, and it seems to us they were, then it would not fit in with those circumstances at all, and the suspicion that it is not genuine would be increased.

There does not seem to have been any appeal against the finding of the first Court that this was not a genuine instrument; and without the point being raised before him by the appellant, the Judge had no right to find to the contrary. We do not think we ought to pay any regard to his decision, and we certainly should feel ourselves at liberty, when the Judge chose to differ from the first Court without any ground of appeal being taken on that point, to see what the circumstances were, and how far we ought to give effect to what he has said.

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We think upon the construction of those documents (and the case to our minds depends upon that) that the mortgagee was entitled to succeed, and that the decree which has been made in favor of the plaintiff cannot be allowed to stand.

The decree of the Lower Appellate Court must be reversed, and the suit dismissed with costs.

The 27th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Mesne Profits—Decree (for more than claim.)

Case No. 213 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Jessore, dated the 5th May 1871, *affirming an order of the Sudder Moonsiff of that District, dated the 7th November* 1870.

Pearee Soonduree Dossee and another (Judgment-debtors) *Appellants,*

versus

Eshan Chunder Bose and others (Decree-holders) *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

A decree for wassilat for a larger sum than that mentioned in the plaint was upheld in appeal, on the ground that the plaint did not profess to do more than give the approximate value of the produce of the land and that the sum decreed had been found due after two careful local investigations.

Glover, J.—THE judgment-debtor is appellant in this case. His ground of appeal is that the Court below has assessed wassilat at a higher rate than that claimed by the decree-holder in his plaint.

As a matter of fact, the sum decreed (1,780 rupees) is larger than that mentioned in the plaint, but then the plaint did not profess to do more than give the approximate value of the produce of the land, the plaintiff having been ousted from it for something more than seven years. The word used in the plaint is অনুমানিক.

We have been referred to the case of Goroo Doss Roy against Bungshee Dhur Sein, to be found in XV Weekly Reporter, page 62, and likewise to the case of Karôo Lall Thakoor against Mr. Forbes, reported in VII Weekly Reporter, page 140; but neither of these cases appear to us to apply. The first was a peculiar case. Though a very small amount of wassilat had been claimed by the plaintiff, the amount decreed was four-fold, and the learned Judges considered that under the circumstances that savoured of extravagance. In the other case, the plaintiff had specially fixed the rate he demanded on each beegah of land, and the Court held that he was bound by his own assessment. If the plaintiff in this case had stated that so much produce had been collected from such a quantity of land, and that he claimed at a certain specified rate per *beegah*, he probably would have been bound by his assessment; but he only gives the approximate value of the whole produce in a lump, and the result of two local investigations carried out, as the Judge remarks, with great carefulness, shows that the proper amount due to the decree-holder was 1,780 rupees.

We may remark in conclusion that this objection was not taken before the Judge of the Lower Appellate Court, and we might very properly have declined to entertain it at this stage of the case.

The appeal is dismissed with costs.

Mitter, J.—I am of the same opinion. I do not think that the appellant is entitled to ask us to look behind the decree, and as the decree does not limit the amount of wassilat to be awarded, the objection based upon the amount claimed in the plaint must necessarily fail.

The 27th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*

Privy Council—Interest—Costs.

Case No. 248 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Jessore, dated the 19th May 1871.

Maharanee Brojo Soonduree Debia (Decree-holder) *Appellant,*

versus

Anund Moyee Debia and another (Judgment-debtors) *Respondents.*

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Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Nil Madhub Bose for Respondents.

Interest cannot be allowed upon costs when the decree of the Privy Council is silent on the subject.

Where only one defendant appeals successfully to the Privy Council and obtains his costs, his co-defendants who did not appeal are not entitled to their costs.

Glover, J.—Two questions are raised in this appeal. The first is that interest ought to have been allowed to the successful appellant in the Privy Council upon the costs awarded to him; and secondly that he ought to recover the costs of the other defendants in the suit, although he was the only party appealing.

On the first point, there can be no doubt. This Court is now executing the decree of the Privy Council. That decree makes no mention of interest to be allowed on the costs, and we cannot supplement it by the addition prayed for. The point has been ruled in the case of Modhoo Soodun Lall, reported in VI Weekly Reporter, Full Bench Rulings, page 109.

In regard to the second point, it appears that the decree-holder was the only defendant who preferred an appeal to the Privy Council, and the decree of that tribunal gave him alone costs. As the other parties did not choose to join him in the appeal, they cannot be allowed to get costs from the plaintiffs.

It appears from the petition of special appeal that the original co-defendants have sold their interest to the present decree-holder, but that would make no difference. We cannot go beyond the words of the Privy Council's decree.

The appeal is dismissed with costs.

The 27th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Section 209 Act VIII of 1859—Set-off of Decrees—Act X of 1859.

Case No. 218 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 29th April 1871, *reversing an order of the Moonsiff of Patnakhalee, dated the 9th June* 1871.

Ignatius Peter D'Silva (Judgment-debtor) *Appellant,*

versus

Ameer Shaha (Decree-holder) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Umerendronath Chatterjee for Respondent.

A decree of one Court cannot be set off, under Section 209 of the Code of Civil Procedure, against a decree of another Court.

Quære. Whether the provisions of that Section are applicable to decrees passed under Act X of 1859.

Mitter, J.—We are of opinion that this appeal ought to be dismissed with costs. The first objection taken by the appellant is that the Judge had no jurisdiction to entertain an appeal from an order passed by the Moonsiff under the provisions of Section 208 of the Code of Civil Procedure. On referring to the Moonsiff's decision, however, we find that the order was passed, not under Section 208, but under Section 209 of the Code, and the objection taken by the appellant, therefore, falls to the ground.

The second objection raised is, that the appellant is entitled to set off certain decrees obtained by him from the Revenue Court under Act X of 1859 against the decree which is now sought to be executed by the respondent under the provisions of Section 209.

We find, however, that the decrees obtained by the appellant were not passed by the Court which passed the decree which the respondent is seeking to execute, and which is now executing it; and the provisions of Section 209 are therefore inapplicable.

It seems also extremely doubtful whether those provisions could be applied to decrees passed under Act X of 1859, but we do not wish to rest our judgment upon this point.

The appeal is dismissed with costs.

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The 27th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Interest—Decretal money.

Case No. 283 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Moorshedabad, dated the 25th August 1871.

Kalee Dass Ghose (Judgment-debtor) *Appellant,*

versus

Puran Koomaree Bibee (Decree-holder) *Respondent.*

Baboo Rajendronath Bose for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Whether interest on decretal money is payable up to the date that it was deposited in Court by the judgment-debtor or up to the date on which the decree-holder applied to get it from the Court, will depend on whether the decree-holder had any notice of the money being so deposited to his credit.

Glover, J.—In this case the decree-holder claims to have interest on his decretal money up to the date on which he applied to get that money from the Civil Court in which it had been deposited by the judgment-debtor; and the judgment-debtor claims to pay interest only up to the date on which he made the deposit. The question is whether the decree-holder had any notice of the money being so deposited to his credit. He does not put in any verified statement to the effect that he did not know of it, and we find that at the time the deposit was made the decree-holder was engaged in execution proceedings against the judgment-debtor, and had proceeded to attach his property. His vakeel was in attendance in the Civil Court, and, it may fairly be presumed, had notice of the deposit being made. Under these circumstances, the decree-holder, we think, is not entitled to interest for any period subsequent to the date on which the deposit was made by the judgment-debtor. The order of the lower Court, therefore, is reversed with costs.

The 28th November 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Hindoo Law — Marriage — Rasee Bibaho —Yautuka—Custom.

Application for Review of Judgment passed by the Hon'ble Justices H. V. Bayley and W. Ainslie, on the 29th June 1871, *in Special Appeal No.* 234 *of* 1871.

Bistoo Pershad Burral (Defendant) *Petitioner,*

versus

Radha Soondur Nath (Plaintiff) *Opposite Party.*

Mr. Piffard and *Baboo Issur Chunder Chuckerbutty* for Petitioner.

No one for Opposite Party.

The question whether the ceremony of *Rasee Bibaho* was a part of the marriage ceremony during the continuance of which gifts to the bride come under the denomination of *Yautuka*, was held in this case to depend on the custom of the district in the caste to which the parties belonged.

Ainslie, J.—The question raised in this application for review of judgment is whether a certain ceremony described as "Rasee Bibaho" is rightly to be taken as part of that marriage ceremony, during the continuance of which gifts to the bride come under the denomination of "Yautuka."

It has been contended by the learned Counsel for the petitioner that the marriage rights conclude with the prostration of the bride "Abhioad" (see Dyakrama Songraha II, 2-3), and that the subject of this review being given on the occasion of the "Rasee Bibaho" must be excluded from the Yautuka." Referring to Dya Bhaga, Chapter IV, Section 2, Verses 14 and 28, it appears that the nuptial presents are limited to such as are given while the marriage ceremony lasts, having been commenced but not finished, and from Verses 4 and 5, Section 1, it appears that such nuptial presents are distinct from gifts in the bridal procession. The articles mentioned in the list marked ङ go

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to the husband if the Rasee Bibaho is included in the marriage ceremonies and not otherwise. We think that the point cannot be satisfactorily determined except by remanding the suit for enquiry into the custom of the district in the caste to which the parties belong. If the Rasee Bibaho be found to be customarily treated as a material portion of the marriage ceremonies, so that gifts made at this particular time are by custom treated as part of the gifts before the nuptial fire, the husband will succeed to the disputed property in list 4.

Costs of the review to follow the result.

The 18th December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit for legacy.

Case No. 820 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 12th June 1871, reversing a decision of the Sudder Moonsiff of that District, dated the 28th February 1871.

Ashootosh Bose (Defendant) *Appellant,*

versus

Huree Churn Nag (Plaintiff) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Kalee Mohun Doss for Respondent.

A suit for a legacy must be brought, not within the jurisdiction where the legatee resides, but within the jurisdiction where the heir resides.

Glover, J.—The question involved in this special appeal is one of jurisdiction. Kala Chand Bose devised by a nuncupatory will 100 rupees a year to his married daughter who resided at Berhampore. Kala Chand's son and heir, the defendant Ashootosh Bose (a half brother of the plaintiff), refused to pay the legacy alleging that his father's last wishes had been misconstrued. The defendant lives within the jurisdiction of the Hurhurparah Moonsiff.

The suit was brought by the plaintiff in the Berhampore Moonsiff's Court, on which the defendant contended that the jurisdiction lay with the Moonsiff of Hurhurparah, the residence of the defendant and the place where the cause of action arose.

Both lower Courts decided that the Berhampore Moonsiff had jurisdiction—the Moonsiff because the will was made at Berhampore, the Judge because the subject matter was analogous to a contract for delivery of goods, and that as in such a contract the cause of action would arise where the goods were to have been delivered, so in this case the cause of action arose where the legacy money ought to have been paid, *viz.*, at Berhampore.

This seems to us to be the proper test, *viz.*, where ought the money to have been paid? at the plaintiff's or the defendant's residence?

If a legacy is to be considered precisely in the same light as a debt, then on the principle that the debtor ought to seek out the creditor, the place of payment would have been Berhampore, and the Judge be right; but we do not think that it can be so considered. Debts stand higher than legacies and are paid before them; the latter are no doubt a burthen on the estate, and an heir cannot take the one without the other, but there seems no reason why the heir should run after the legatee, or be bound to pay him his legacy, at the latter's residence. The more reasonable course would be for the legatee to present himself at the heir's residence—in this case the residence of the testator—and there receive the money due. The plaintiff seems to have had at one time the same views, for she applied for her legacy at the residence of the defendant. We do not see any analogy between a case of this kind, and a contract for goods sold and delivered. And moreover such analogy begs the whole question; in a contract for goods the place of delivery is undisputed: if that were so in this case, the question of jurisdiction would not arise.

On the whole, we are of opinion that the legatee was bound to bring her suit within the jurisdiction of the Moonsiffee in which the heir lived, and that the Berhampore Moonsiff had no authority to entertain the suit.

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This special appeal must, therefore, be allowed, and the plaintiff's suit dismissed with all costs.

The 13th December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Execution—Election—Mortgage.

Case No. 246 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Moorshedabad, dated the 28th July 1871.

Kalee Dass Ghose (Decree-holder) *Appellant,*

versus

Lall Mohun Ghose (Judgment-debtor) *Respondent.*

Mr. Woodroffe for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where a creditor sued upon a bond and got a decree declaring his debt leviable from certain landed property on which the bond gave him a mortgage lien as well as from any other property found in possession of the debtor, but having elected to satisfy his mortgage lien and procured the sale of the landed property subject to that lien, Held that he was bound to recoup himself from the mortgaged property, and that he could not get any part of the surplus sale proceeds unless it were shown that the mortgaged land had not produced enough to satisfy his claim.

Glover, J.—THE decree-holder, Kalee Dass Ghose, sued the judgment-debtor on a bond dated Bysack 9th, 1276, and got a decree. The bond was specially registered, but the creditor did not proceed under the special law. He contented himself with bringing a civil suit and eventually he got a decree declaring the debt leviable from certain landed property on which the bond gave him a mortgage lien—as well as from any other property that might be found in possession of the debtor.

The decree was dated February 28th, 1871, but before Kalee Dass Ghose obtained it, the landed property mortgaged by the bond was sold in execution of two Civil Court decrees Nos. 205 and 206, obtained by Mohessur Dass. This sale took place on the 20th February 1871. Whilst it was pending, Kalee Dass Ghose objected that he had a lien on the property and in consequence the sale was made with the mortgagee's rights reserved, the interest that passed to the purchaser being the equity of redemption only.

The property was sold for rupees 43,505, and Mohessur Dass's claims duly satisfied therefrom. The balance would in the ordinary course of things have been handed over to the debtor, but Kalee Dass again objected, and demanded to be paid the amount of his decree out of the surplus sale proceeds.

The Subordinate Judge refused this, holding that the judgment-creditor having satisfied his mortgage lien and procured the sale of his debtor's estate subject to that lien, was bound to recoup himself from the mortgaged property, and could not get any part of the sale proceeds, unless it were shewn that the mortgaged land had not produced enough to satisfy his claim.

The decree-holder appeals, urging that as his decree gave him power to recover his money from any part of the debtor's property, he could give up his mortgage lien and come upon any other funds belonging to the judgment-debtor.

It appears to us that the decree-holder should be made to abide by his election: he interfered at the auction sale and notified publicly that he retained his lien over the property. The consequence was that the estate, instead of being sold free of incumbrance (and it is not contended that there were any other liens upon it), was sold subject to a debt of nearly 15,000 rupees. And it can hardly be supposed that such a burthen did not considerably reduce the price bid. There is nothing on the record to show what effect Kalee Dass's notification had on the result of the sale, but it could hardly have been other than disadvantageous.—And then, besides, if Kalee Dass be now allowed to give up his mortgage lien and re-imburse himself from the sale proceeds, what is the position of the auction purchaser? He bought the

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rights and interests of the judgment-debtor—the equity of redemption that is—but if there be no mortgage on the estate as there would not be if the creditor gave up his lien, there is no equity of redemption left; and again if there be no mortgage, the property is unencumbered. So it would seem that the auction purchaser has either bought nothing, or else, instead of the equity of redemption, has bought the entire proprietary right in the estate—a right that was never put up to sale at all. And so with the debtor. If the mortgage falls, which would seem to be the case if the creditor were allowed to satisfy his decree from the sale proceeds, how is he to get back his land? must he bring a suit to compel the creditor mortgagee to re-assign the mortgaged interest? It seems to us that, if the decree-holder gets what he asks, the debtor will, after having paid the entire amount of the bond, be in a very considerable difficulty, and the auction purchaser in a most anomalous and improper position.

The case of Mirza Futteh Ali *versus* Gregory, VI Weekly Reporter, 13, Miscellaneous, is very much in point and supports the view we have taken above.

The appeal will be dismissed with costs.

The 5th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Appeal — Section 11 Act XXIII of 1861 — Section 223 Act VIII of 1859 — Declaratory decree — Decree for possession—Third party.

Case No. 178 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 4th April 1871.

Ameeroonnissa Khatoon (Third party) *Appellant*,

versus

Abedoonnissa Khatoon (Decree-holder) *Respondent*.

Baboo Doorga Mohun Doss for Appellant.

Mr. C. Gregory and *Baboo Kalee Mohun Doss* for Respondent.

A female plaintiff obtained a decree against certain defendants, declaring certain ekrarnamahs, &c., void as against her husband and his representatives. After his death, she proceeded to execute the decree as one for possession, and obtained an order under Section 223 Act VIII of 1859, for delivery of possession of property in the possession of a third party as being a person claiming under a title created by the defendants subsequently to the institution of the suit. The third party appealed from that order. HELD, that this was not a case in which an appeal lay under Section 11 Act XXIII of 1861, inasmuch as the questions raised by the appeal were not questions between the parties to the suit.

Semble.—A decree which is not a decree for possession, cannot, under Section 223, be executed by an order for delivery of possession of property in the possession of a third party who has acquired a title subsequently to the institution of the suit.

Normam, C. J.—THIS appeal must be dismissed upon the preliminary objection of the pleaders for the respondent that no appeal lies in this case. The facts are shortly these:—A decree having been obtained by Abedoonnissa Khatoon and others against Abdool Ali and others, by which it was declared that certain ekrarnamahs and Meeran pottahs, dated respectively the 29th Falgoon 1259, the 16th Aughran 1263, the 6th Jeyt 1264, and the 15th Aughran 1264, were of no effect, and void as against Moulvie Wahid Ali in his life-time, and are void as against his lawful representatives. The decree-holder, Abedoonnissa Khatoon, after the death of her husband Wahid Ali, proceeded to execute the decree as a decree for possession; and finding Ameeronnissa Khatoon, the wife of Abdool Mujid, in possession of a certain Talook, called 1989, she obtained an order for execution under section 223 against Ameeroonissa Khatoon, as being a person claiming under a title created by the defendants in the suit subsequent to the institution of the suit.

The Judge of Backergunge, Mr. Maclean, ordered the petitioner Abedoonnissa Khatoon to be put in possession of the nine-sixteenths of Khaspore Talook, as specified in the schedule, by removing anybody opposing her entry.

Ameeroonnissa has attempted to appeal from that order, and has objected that the property, of which she was in possession, is not the property described and included in the decree; and that there is another objection patent on the face of the decree,—namely that the decree of the Appellate Court is not a decree for possession of the property. Whatever may be the fact as to the first point which the appellant has attempted to raise on this appeal, it would seem plain that a decree which is not a decree for possession

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cannot, under Section 223, be executed by an order for delivery of possession of property in the possession of a third person, who has acquired a title subsequent to the institution of the suit.

But a preliminary objection is taken to the effect that this is a case in which there is no appeal under Section 11 of Act XXIII of 1861, and in fact we find it impossible to say that the questions raised by the appeal are questions between the parties to the suit. They are in truth questions between the plaintiff and a person who is a stranger to the suit, to the prejudice of whose title the plaintiff seeks to execute her decree.

Under these circumstances the appeal must be dismissed, but each party will pay her own costs.

The 13th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Execution—Decrees — Set-off- Jurisdiction — Transfer from Revenue Court—Section 3 Act III of 1870 B. C.

Case No. 193 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Twenty-four Pergunnahs, dated the 10th March 1871, reversing an order of the Second Subordinate Judge of that district, dated the 9th December 1870.

Huro Pershad Roy Chowdhry (Decree-holder) *Appellant*

versus

Fool Kishoree Dossee (Judgment-debtor) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Khetternath Bose for Respondent.

A set-off cannot be allowed for costs not actually awarded, as where a decree of the High Court gave the successful appellant costs of that Court and of the Lower Appellate Court but omitted to award the costs of the first Court.

A decree which is incapable of being enforced cannot be set-off against a decree which is alive.

A decree in which no actual proceedings were pending in the Collector's Court at the commencement of Act III of 1870 B. C. (*i. e.* where an order for attachment had been issued, but the attachment came to an end) was held to have been properly transferred to the Civil Court under Section 3 of that Act.

Norman, C. J.—It is quite clear that the decision of the Judge must be set aside in this case.

This was a suit brought by one Huro Pershad Roy Chowdhry against Fool Kishoree Dossee in the Collector's Court for rent. The plaintiff obtained a decree, and was executing that decree when, on the 7th February 1865, the defendant claimed to set-off the costs in an action by this plaintiff against her husband, Bishonath Dey, in which the defendant's husband had succeeded; and on the 16th March an order was passed by the Deputy Collector allowing the set-off to the extent of the costs awarded to Bishonath Dey by the High Court and the Lower Appellate Court, without including however the costs incurred in the Deputy Collector's Court. Upon these proceedings, a balance was struck after allowing the set-off, showing Rs. 566-13 annas to be due to the plaintiff Huro Pershad Roy Chowdhry.

In 1868, the plaintiff attached certain property as belonging to the defendant Fool Kishoree. It appears, however, that a claim having been put in by a third party to that property, the claim was allowed, and the property was again placed under attachment.

After the passing of Act III of 1870, the decree was transferred from the Collector's Court to the Civil Court for execution under the provisions of the 3rd Section of Act III of 1870.

Upon the plaintiff's proceeding to execute the decree, the defendant claimed to set-off the costs which she says her husband was entitled to under the decree of this Court in 1863,—costs which had not been allowed by the Deputy Collector when the question of set-off was under discussion in 1865.

The Subordinate Judge of the 24-Pergunnahs, Baboo Mohendro Nath Bose, disallowed the defendant's claim. From that decision, there was an appeal to the Judge. The Judge says: "As the costs of the "Court of first instance are recoverable by "Bishonath (that is the defendant's deceased "husband) the amount must be ascertained. "It seems that the Collectorate Amlah did "not write out decrees, and therefore the "costs are not shown; but Bishonath's "claim cannot be disallowed on that account." He, therefore, remanded the case to the Subordinate Judge directing him to "calcu-"late the costs in the Collector's Court and

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"the balance actually due now on the adjust-"ment of the account."

From that decision there is an appeal, and Baboo Bhowanee Churn Dutt has taken two objections to the decision, each of which is palpably fatal to it.

In the first place, it is clear that the decree of the High Court in 1863, when referred to, does not award to Bishonath Dey, the defendant, appellant, who was then successful, any costs in the Collector's Court; and it is clear that whether the omission was in consequence of any defect in the judgment, or of any negligence on the part of the appellant Bishonath Dey in not getting the decree properly drawn up, if the costs of the first Court were not awarded to him, a set-off cannot be allowed for costs of a sum of money that was never due.

The second objection is, that if there was a decree in 1863, no steps have been taken to keep it alive, and the decree is, therefore, one, of which the execution is barred by limitation; and that it would not be equitable, or right, or consistent with principles of justice to allow a decree, which is incapable of being enforced, to be set off against a decree which is alive.

The third objection is, that, in March 1865, this point was brought forward and was disallowed—and properly disallowed by the Deputy Collector, Mr. Sevestre; that if they had any case, it was open to Bishonath Dey, or Fool Kishoree, by an application for review, or otherwise, to have the matter set right; but from 1865 to 1871 they have been inactive.

There is an objection taken by way of cross-appeal to the effect that the Subordinate Judge had no jurisdiction to proceed with the execution in the present case, on the ground that the decree could not be transferred from the Collector's Court to the Civil Court for execution under Section 3 of Act III of 1870, B. C.

That depends upon the language of that enactment. The Act recites that as it is expedient to transfer to the Civil Courts certain suits and proceedings now pending in the Revenue Courts, it is enacted that "from "and after the date of the commencement of "this Act, all suits and applications under any "of the Acts mentioned in Schedule (D) "to Act VIII of 1869, passed by the Lieutenant-Governor of Bengal in Council, which "may be then pending in any of the Re-"venue Courts in any place to which the "said Act may extend, shall be heard and "determined in the manner hereinafter en-"acted."

Section 2 refers to the suits that may be transferred under the Act, and then comes Section 3, which relates to decrees, and runs as follows:

"All decrees in which an order for the "attachment of property has not at the time "of the commencement of this Act been "issued, and all decrees which shall, after the "commencement of this Act, be made in any "suit now pending in the Revenue Courts, "shall be transferred to the Court which, "under the provisions of the said Act VIII "of 1869, would have jurisdiction to enter-"tain the suit in which the same were made, "and such execution and proceedings may "be had in respect of such decrees as if the "same were decrees of the Court to which "they shall have been so transferred, made "in pursuance of the said Act VIII of "1869."

The wording of the Act is somewhat peculiar. It does not say "all decrees in which no order for attachment has been issued," &c., which would make it clear that if in any case an order for attachment had been issued, such case would be incapable of being transferred. It says, "all decrees in which an "order for the attachment of property has "not at the time of the commencement of "this Act been issued, and all decrees which "shall, after the commencement of this Act, "be made in any suit now pending in the Re-"venue Court, shall be transfered," &c—that is to say, all cases in which an order—a living order—capable of being enforced, has been issued, and is now pending. It appears to us that this is the proper construction of the Act.

It is clear that the mischief to be avoided is the transfer of cases in which actual proceedings are going on in the Collector's Court at the time of the transfer. If an order for attachment had been made, and the attachment had come to an end, in such a case we see no reason why the suit should remain in the Collector's Court to be worked out in the expired Court of the Collector, if no proceedings of any kind were pending at the time, and if the decree was one which was complete and capable of execution in the Civil Court.

I think, therefore, that the objection fails, and that the case was properly transferred to the Civil Court, and the Subordinate Judge had power to entertain it.

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The order of the Judge is, accordingly, reversed, and that of the Subordinate Judge is restored and affirmed with costs.

Mitter, J.—I am of the same opinion. The respondent has failed to show that any decree for costs was passed in her husband's favor in the ejectment suit, and the question of set-off does not therefore arise.

I also concur in the construction put by the learned Chief Justice on the languages of Section 3 Act III of 1870, which seems to be the only reasonable construction that can be put upon the words of the legislature.

The 14th September 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Manager—Safeenamah—Mooktear—Suit—Costs.

Case No. 726 of 1871.

Special Appeal from a decision passed by the Judge of 24-*Pergunnahs, dated the* 19*th April* 1871, *modifying a decision of the Second Subordinate Judge of that District, dated the* 16*th August* 1870.

Bholanath Sandyal (Plaintiff) *Appellant,*

versus

Gouree Pershad Moitro (Defendant) *Respondent.*

Baboos Gopal Lall Mitter and *Rajendro Nath Bose* for Appellant.

Baboos Unnoda Persaud Banerjee, Sreenath Doss, and *Tarucknath Sein* for Respondent.

The manager of an estate under a *safeenamah* on behalf of B, cannot, without special authority from B, represent him in any suit or charge him with the costs of the defence of an action brought against him.

Norman, C. J.—We think it quite clear that in this case there is nothing in the position of Gouree Persaud, managing the estate under the safeenamah dated the 3rd December 1861, which authorized him to charge the plaintiff Bholanath Sandyal with the costs of the defence of an action brought against him, Gouree Persaud, by Guddadhur, and certainly nothing to justify him in charging them in this account.

Baboo Unnoda Persaud Bannerjee says, that, under that agreement, Gouree Persaud was placed in the position of the manager of the estate on behalf of the plaintiff Bholanath. It is true that he was manager, but on certain specified conditions, which however did not include any power or authority to act as the general mookhtear of Bholanath Sandyal or to represent him in any suit. If a suit was brought against him affecting Bholanath's interests, it was his plain and clear duty to inform Bholanath of the fact, and give him an opportunity of appearing and defending his own rights; or if Bholanath thought fit to give him, Gouree Persaud, a mookhtearnamah, he would be in a position to act for him or instruct a vakeel to represent Bholanath and appear and defend his interests. But without some indication of such authority he must take the consequences of his own acts, and cannot hold Bholanath responsible for them.

The only other item in dispute is as to a claim for Rs. 217 which has been disallowed. The only reason why it is disallowed is that a sum of money which was collected in 1271 between the months of Bysakh and Srabun was carried into the family accounts of 1272, and it is supposed that Bholanath Sandyal had the benefit of this in a former suit for accounts. But on referring to that it appears that that suit was for an account down to the end of Cheyte 1271, and did not include any claim for rents received between Bysakh and Srabun 1271. That being so, it is clear that this sum of Rs. 217 has been improperly disallowed.

The result will be that Bholanath Sandyal is entitled to have the amount allowed to him in the suit increased by one-third of the sum of Rs. 2,826, being the aggregate of two sums one of Rs. 2,609, being costs of the High Court, and the other of Rs. 217. That one-third amounts to Rs. 942, which together with Rs. 512-4 As., and 16 Gundahs will give Bholanath a decree in this suit for Rs. 1,454 4 As. 16 Gundahs. There will be a decree in his favor for that amount with interest from the close of 1272, and costs upon that valuation both in this Court and the Lower Courts.

We allow no costs to the defendant.

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The 8th December 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Appeal—Security.

No. 279 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 3rd June 1871.

Bhugobutty Churn Bhuttacharjee and another (Opposite party) *Appellant,*

versus

Issur Chunder Chatterjee (Petitioner) *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

There is no reason why a respondent, who is admittedly the legal heir of the deceased proprietor, should be required to give security at the instance of the appellants, who are mere strangers.

Mitter, J.—We see no reason to interfere with the judgment of the Lower Court in this case. The evidence adduced by the appellants to prove the will propounded by them has been rejected by the Judge as unworthy of credit for sufficient reasons. We see no reason for arriving at a different conclusion.

With reference to the second point, we do not see why the respondent, who is admittedly the legal heir of the deceased proprietor, should be required to give security at the instance of the appellants, who are mere strangers.

The appeal is dismissed with costs.

The 15th December 1871.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—Attachment.

Case No. 200 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 12th November 1870, *reversing an order of the Moonsiff of that District, dated the 11th July* 1870.

Choona Mahomed Sircar (Decree-holder) *Appellant,*

versus

Shurno Lutta Debia (Judgment-debtor) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

The Judge was held to have no power to interfere with the Moonsiff's order when all that the Judge had before him was the Moonsiff's order declining to reverse a former order of attachment by a former Moonsiff.

Bayley, J.—We think it sufficient, in reversing the order of the Judge in this case, to state that when all that the Judge had before him was the Moonsiff's decision to the effect that the former order of attachment by a former Moonsiff could not be reversed by him (the Moonsiff) it was beyond the Judge's power to interfere with that order.

In this view, we think it unnecessary to express any opinion on the question of right to attach future maintenance.

The order of the Judge is reserved.

The 15th December 1871.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction — Special Appeal — Inferences of fact.

Case No. 881 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 27th April 1871, *reversing a decision of the Subordinate Judge of that District, dated the 6th February* 1871.

Hameer Mahomed Chowdhry (Plaintiff) *Appellant,*

versus

Fool Mahomed Chowdhry and others (Defendants) *Respondents.*

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Baboo Anund Chunder Ghossal for Appellant.

Baboo Sreenath Doss for Respondents.

It is most essential in special appeal that the High Court should be very careful in not interfering with inferences of fact drawn by a Lower Appellate Court.

Markby, J.—I THINK we ought not to interfere in this special appeal. I do not think it necessary to set out the facts of the case, because as it appears to me, having carefully listened to all the arguments taken by the pleader for the appellant, they really only consist in a criticism of the inferences drawn by the Judge on the evidence contrary to the inferences drawn by the Subordinate Judge in the same case. Now, although there may be some force in these observations, I do not think any one of them points out any error in law upon which we can interfere in special appeal, and I think it is most essential that this Court should be very careful in not interfering with the inferences of fact drawn by the Lower Appellate Court. There was one objection which alleged that the *onus* of proof had been wrongly thrown by the Appellate Court on the plaintiff and rightly thrown by the first Court on the defendant. The truth, however, seems to me to be that the two Courts start with different assumptions; the first Court assumes that there was a *primâ facie* case in favor of the plaintiff by the position of the lands and the relation of the parties, and therefore very rightly places the subsequent *onus* on the defendant; but the Lower Appellate Court goes one step further back and refuses to assume any *primâ facie* case in favor of the plaintiff. The Lower Appellate Court, therefore, had a perfect right to say that the plaintiff must prove his case in the usual way. The Lower Appellate Court goes then fully into all the evidence and comes to a finding of fact in variance with the first Court.

Under these circumstances, we think we have no other choice than dismissing this appeal with costs.

Bayley, J.—I concur.

The 15th December 1871.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Minors—Certificate—Act XL of 1858.

Cases Nos. 327 and 328 of 1871.

Miscellaneous Appeals from an order passed by the Officiating Judge of Dinagepore, dated the 3rd August 1871.

Mohesh Chunder Sein and another (Petitioners) *Appellants,*

versus

The Collector of Dinagepore (Opposite Party) *Respondent.*

Baboo Jogendro Nath Bose for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

A Civil Court may defer passing orders on an application for a certificate under Act XL of 1858 pending an enquiry by the Collector as to the alleged fraud of the manager and the state of the accounts and the assets of the property.

Bayley, J.—THE two cases are admitted to be governed by one and the same decision.

The appeal is against the order of the Judge directing that copy of a certain proceeding be sent for the information of the Collector and the case be struck off.

The facts are these:—The estate was in charge of the Collector before and after the death of the minor. Moreover, before the minor's death an order was made to the effect that an enquiry should be instituted by the Collector into the question of the fraud of Issur Chunder the manager, and into the state of the accounts and the assets of the property.

The appellants urge that, since they were applicants for a certificate, the Judge has erred in law in striking off their case and not passing a distinct order under Act XL of 1858 as to whether the applicants were entitled to the certificate or not.

Looking to the circumstances above stated, we do not think that the Judge has erred, or that we are called upon to reverse his decision. We read the Judge's order to mean that preliminarily to passing a final order on the petition of the appellants, and the estate being in the hands of the Collector, the Judge wished to be informed as to the alleged fraud of Issur Chunder and the state of the accounts and the assets of the property.

We think then that this appeal is premature. When the report shall have been made by the Collector to the Judge and the Judge has the petition of the appellants for a certificate before him and then refuses to pass any order on that petition, it will be open to the present appellants to come up before us and shew any impropriety or illegality in the Judge's order; but as it is, the present appeal before us is premature, and is therefore rejected with costs.

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FULL BENCH RULINGS.

The 12th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

High Court—Decree—Execution—Limitation—Sections 19 and 20 Act XIV of 1859.

Case No. 299 of 1870.

Miscellaneous Regular Appeal from an order passed by the Judge of Dacca, dated the 31st May 1870.

Ram Churn Bysack and another (Decree-holders) *Appellants*,

versus

Luckhee Kant Bornick and others (Judgment-debtors) *Respondents*.

Baboos Romesh Chunder Mitter and *Kalee Kishen Sein* for Appellants.

Baboos Kalee Mohun Doss and *Sreenath Doss* for Respondents.

HELD that whether a decree of a lower Court be reversed, or modified, or affirmed on appeal by the High Court, the decree is a decree of the High Court, and that such decree is governed not by the 12 years limitation prescribed by Section 19 Act XIV of 1859, but by the 3 years limitation prescribed by Section 20 of that Act.

This case was referred to the Full Bench by E. Jackson and Onoocool Chunder Mookerjee, J. J., with the following remarks:—

Jackson, J.—THE point of law which was reserved in this case was taken by Baboo Romesh Chunder Mittter for the appellant. It was not directly stated in the memorandum of appeal, but permission was given by the Court to allow it to be argued. It was a very important point and one which would frequently arise and one which would at once determine in this case whether limitation barred the execution proceedings or not. Baboo Romesh Chunder Mitter argued that the decree which was sought to be executed was in fact a decree of the High Court, and that accordingly under Section 19 Act XIV of 1859 the decree-holder was entitled to 12 years limitation, instead of 3 years limitation which would be applicable if the decree which was sought to be executed was a decree of the Zillah Court. If this argument is correct, the decree-holder is admittedly within time. There is some difference of opinion between my learned colleague and myself upon this point. I am rather inclined to concur with the learned Judges who decided the case to be found in 8 Weekly Reporter, page 471. My learned colleague, on the other hand, is of opinion that when a decree of the original Court comes up on appeal to the High Court and is affirmed by the High Court, the decree then becomes a decree of the High Court.

It is true that in this case the High Court in affirming the decision did not record a direct decree, but it may still be that the decree virtually became a decree of the High Court by the confirmation of the decree of the first Court.

There seems to be, as far as I have been able to learn, some difference of opinion on the subject even among the Judges of this Court, and there is some confirmation of this new view of the law to be found in a decision of Chief Justice Sir Barnes Peacock, on a Full Bench reference to be found in 7 W. R., page 521; and there is also some confirmation of this view of the law in another decision of Chief Justice Sir Richard Couch, and also in a decision of the Bombay High Court.

None of these judgments in fact determined the point, because the point was not especially involved in the cases then under trial. But there are some expressions in those decisions which certainly go to the extent of ruling that a judgment of a lower Court, affirmed on appeal by the High Court, becomes thereby a new judgment and a new decree. This question is the more important because it is a question which must be constantly arising not only in other execution proceedings, but also because there is involved in it the question as to how the decrees of this Court should be drawn up.

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If it is the case that in confirming the judgment of the lower Court this Court thereby passes a new decree, then the decree should distinctly contain whatever is thereby decreed.

My learned colleague thinks that it is a fit case to be referred to a Full Bench, and that is the opinion of other Judges of this Court, and I agree with them in referring the case to a Full Bench.

The question, therefore, will be submitted for the decision of a Full Bench.

Mookerjee, J.—The petitioner in this case is the decree-holder. He obtained a decree for a considerable sum of money in the Zillah Court on the 30th December 1863, which on regular appeal was affirmed by the High Court on the 18th February 1865. After several intermediate unsuccessful executions which had been struck off, he again applied for execution on the 16th December 1869, when the judgment-debtor appeared and raised the plea of limitation. The Subordinate Judge has held the application to be barred under the 20th Section of the law of limitations, inasmuch as he was not satisfied that there was any *bonâ fide* attempt to execute the decree within 3 years next preceding the date of the present application for execution.

Dissatisfied with this order, the decree-holder prefers a regular appeal to this Court, and among other pleas urges that the Court below was wrong in applying the rule of 3 years limitation under Section 20 of Act XIV of 1859, but that in the present case it should have, under the provisions of Section 19 of that enactment, applied the 12 years rule to it and held the application not to be barred.

It is contended by Baboo Romesh Chunder Mitter that the decree passed in this case by the Zillah Court having been confirmed in regular appeal by the High Court, it has become a decree of the last mentioned Court; and as the High Court of appellate jurisdiction is a Court established by Royal Charter, its decrees can be executed within 12 years under the provisions of Section 19 of Act XIV of 1859.

I am disposed to consider this contention to be sound. Under Section 350 of the Civil Procedure Act, I find "the judgment "of the Appellate Court may be for confirm-"ing or reversing or modifying the decree "of the lower Court." Section 359 contains directions as to how the judgment of the Appellate Court is to be pronounced, and what it is to contain or consist of; and the Section following it, *viz.*, Section 360, ordains that the decree of the Appellate Court "shall contain the number of the "suit, the names and descriptions of the par-"ties, appellant and respondent, and the "memorandum of appeal, and shall specify "clearly the relief granted or other deter-"mination of the appeal. It shall also "state the amount of costs incurred in the "appeal, and by what parties and in what "proportions such costs and the costs in the "original suit are to be paid."

Then Section 361 requires that a certified copy of such decree shall be transmitted to the Court which passed the first decree in the suit, and that such copy shall be filed with the original proceedings thereof; and lastly, that an entry of the judgment of the Court of appeal shall be made in the register. Section 362 enacts that applications for the execution of the decree passed by the Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court as if it was a decree of its own.

These Sections of the law appear to my mind clearly to show that when an appeal is heard by the superior Court, and a decree is passed either confirming the decree of the Court of first instance or reversing or modifying the same, that that decree of the superior Court is the only decree in the suit and is the decree which should be executed, and that the decree originally passed by the lower Court no longer exists. If the decree of the first Court is reversed by one of the Appellate Court, there can be no doubt whatever that the decree made by the first Court in no more. If the decree is modified, then even it cannot also possibly be said that the original decree stands; but the question is, when the decree passed by the first Court is simply affirmed in appeal, whether the original decree in the case stands or is not substituted by the decree of affirmance passed by the Appellate Court: or in other words, whether the first decree is or is not merged in that of the superior Court. I admit I cannot find any difference in the three instances cited above. I would hold that in all these cases whether the decree is affirmed, or reversed, or modified, the decree of the first Court ceases to exist, and the decree passed by the Appellate Court takes its place and stands instead thereof.

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Section 360 of Act VIII of 1859 aforecited requires that the decree of the Appellate Court shall specify clearly the relief granted, and shall also state the amount of costs of the original suit, and how, by what parties, and in what proportion, such costs and the costs incurred in the appeal are to be paid. From the language of the law, it appears to me that the decree of the superior or Appellate Court must contain all these particulars, whether the same be for affirming, or reversing, or modifying the decree of the Court of first instance. The reason seems to me to be clear, because if, as I apprehend, the decree of the Appellate Court is to take the place of that passed by the first Court, then it seems to me that it was necessary that the substituted decree should specify not only the relief which it is the object of the suit to obtain and the decree to grant, but should also specify the amount of costs of the first Court as well as that of the Court of appeal which the unsuccessful party is to pay, in order that the decree of the Appellate Court should be complete and definite, and there would be no necessity to refer for those particulars for the purposes of execution to the decree of the lower Court which has been superseded.

There is another test to apply by which it can be seen whether the above view taken by me is a correct one or not. On referring to the XIth Chapter of the Code of Civil Procedure, it will be found that Section 376 enacts that any person considering himself aggrieved by a decree of the Sudder Court (now High Court) may, on the discovery of new matter or evidence, or for any other good and sufficient reason, apply to the aforesaid High Court for a review of its judgment passed on appeal. The Division Benches of this Court have uniformly held that where the High Court has passed a decree on appeal, whether for confirming the decree of the lower Court or reversing or modifying the same, parties desirous of obtaining a review of the judgment in the suit must apply to the High Court only. The present Chief Justice Sir Richard Couch has held, and I think held properly, that "after a decree has come up "on appeal and been confirmed by this "Court, the lower Court has no power to "make any alteration in it, even to correct "a clerical error. The proper course would "be to apply to the High Court, whose decree "*it has become.*" This shows beyond doubt that the learned Judges who decided this case (the Chief Justice and Justice Kemp) were clearly of opinion that the decree of the original Court, if confirmed on appeal by the High Court, becomes a decree of the High Court. I cannot see why, if for the purposes of an application for review or correction of an error even clerical, the power of the original Court ceases, because the decree having been confirmed on appeal became the decree of the Appellate Court, and no longer that of the Court which passed it originally, it should be held that, for the purpose of determining whether the one rule of limitation should be applied or the other to the execution of that decree, it should be held that the decree in the case is the decree of the District Court, and not that of the High Court which is established by Royal Charter. This decision of the learned Chief Justice* alludes to another case to be found in 2 Bombay High Court Reports, page 116. Both these decisions support the view that I am disposed to take of the law in this case.

We are referred by Baboo Romesh Chunder to a decision of the Full Bench reported in 7 W. R., page 521. The late Chief Justice Sir Barnes Peacock, in delivering the judgment of the Full Bench, after determining that the words "any judgment, decree or order used in Section 20 of Act XIV of 1859" must mean a judgment, decree, or order of the High Court, lays down this view of the law,—that "if in the case of an appeal a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, and the period for applying for execution would commence from the time of the new judgment of affirmance."

I would also like to mention another judgment of this Court which takes the same view of the law as I take. That is a decision passed by Justices Bayley and Kemp, and is reported in 14 Weekly Reporter, page 288. The only difference between that case and the present one is that the decree of which execution was sought in that case was modified to some trifling extent by the High Court on appeal, but I am of opinion that in principle there is no real distinction between a decree of the High Court affirming the decree of the lower Court, and one modifying the same. In every instance a new decree is required to be drawn up under the provisions of Section 360 of Act VIII of 1859.

* 14 W. R., p. 26.

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The pleader for the respondent however referred us to a decision of a Division Bench of this Court which to some extent goes against the view I would take of the law. This decision is reported in page 470, 8 W. R. The learned Judges who decided that case were of opinion that the costs awarded by the High Court of appellate jurisdiction in its decree can be recovered in execution within 12 years, but they held that the decree of the lower Court affirmed by the High Court remains nevertheless a decree of the District Court, and as such must be executed within 3 years.

As the point raised is one of great and general importance which may arise in numerous cases in the execution department, I would submit it for the consideration of a Full Bench.

The questions that I would propose for the determination of the Full Bench will be; 1*st*—Whether a decree of the District Court affirmed on appeal by the High Court becomes a decree of the last mentioned Court; 2*nd*—Whether execution of that decree of affirmance passed by the High Court is to be governed by the provisions of Section 19 of the Statute of Limitation Act XIV of 1859 or Section 20 of that enactment, *i. e.*, whether the rule of 3 years or of 12 will apply.

The following are the judgments of the Full Bench :—

Norman, C. J.—In this case, two points have been raised for the consideration of a Full Bench by a Division Bench consisting of Mr. Justice E. Jackson and Mr. Justice Onoocool Chunder Mookerjee.

First.—Whether a decree of the District Court affirmed on appeal to the High Court becomes a decree of the High Court; and

Secondly.—Whether execution of that decree of affirmance passed by the High Court is to be governed by the provisions of Section 19 of the Statute of Limitation Act XIV of 1859, or by Section 20 of that enactment;—whether the rule of 3 years or 12 will apply.

As to the first point, we observe that in the case before us the decree which was affirmed on appeal by the High Court was one which came before the Court on regular appeal. By Section 189, the decree in the first Court is to contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and is to *specify clearly the relief granted or other determination of the suit.*

By Section 350, the judgment of the Appellate Court may be for *confirming or reversing or modifying* the decree of the lower Court. By Section 360, the decree of the Appellate Court is to contain the number of the suit, the names and descriptions of the parties, &c., and *shall specify clearly the relief granted or other determination of the appeal.* It *shall* also state the amount of costs incurred in the appeal, and *by what parties and in what proportion such costs and the costs in the original suit are to be paid.*

It is clear that the decree in the Appellate Court is to have the same relation to the suit as the decree in the first Court has in cases where there is no appeal. It is to be the final determination of the suit and of all matters in dispute therein. The Appellate Court is not merely at liberty, but is required to dispose by its decree of the costs in the lower Court,—a matter which, in cases when the decree is affirmed, is merely a part of the affirmance.

Suppose the lower Court made a decree in favor of the plaintiff for twenty parcels of land. If on an appeal from the whole decree the Appellate Court were to uphold the decision of the first Court except as to one parcel, as to which it might adjudge that the suit should be dismissed; could it be said that on this adjudication there would or could be two decrees,—a decree so far as it dismissed the suit as to one parcel of land being a decree of the Appellate Court,—and as to the rest, a decree of the first Court? There can be no doubt but that in such case it would be the duty of the Appellate Court to make one single and complete decree in the suit.

Nor would the duty be the less if the Court were to uphold the decision of the lower Court on all points. The Appellate Court would in that case be bound by Section 350 to confirm the decision of the lower Court.

In all cases in which the decree on appeal is regularly drawn up in due form it ordinarily disposes of all the matters dealt with by the decree of the lower Court, and the decision of the lower Court becomes merged in and superseded by the decree of the superior tribunal. We entirely concur in the view taken by Mr. Justice Mookerjee that whether the decree of the lower Court

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is reversed, or modified, or affirmed, the decree passed by the Appellate Court becomes the final decree in the suit. In the case before the Court, the decree is not drawn up in accordance with the terms of Section 360. It simply dismisses the appeal with costs. But this is mere matter of form, and we think that the decree of the High Court must be treated as containing by implication an affirmance of the decree of the lower Court.

The next question is whether a decree of the High Court on its appellate side affirming the decision of a District Court is governed by the provisions of Section 20 of Act XIV of 1859.

By Section 361 of the Code of Civil Procedure, a copy of the decree of the Appellate Court is to be transmitted to the Court which passed the first decree in the suit appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the original register of the suit. It is to be transmitted, not merely for the purpose of execution, but for the purpose of becoming the final decree in the suit and of being entered as such in the register.

It is, however, still treated as the decree of the Appellate Court; (see Section 362.) It is to be executed according to the rules hereinbefore (that is in the Code of Civil Procedure) contained for the execution of original decrees. Now, amongst the rules for the execution of original decrees is Section 288, which provides that when application is made to any Court to execute the decree of any other Court transmitted to it for execution, the Court to which the application shall be made shall execute it according to its own rules in the like cases. If therefore a time is limited within which the decrees of the lower Court must be executed, the same limitation will apply to the decrees of the Appellate Court transmitted to it. If the decree of the Appellate Court is one for which a special period of limitation has been expressly provided, such provision would constitute an exception to the general rule.

The 19th Section of Act XIV of 1859 with respect to judgments, decrees, or orders of "any Court established by Royal Charter" allows 12 years after a right to enforce the same shall have accrued, &c.

The 20th Section is as follows:—"No process of execution shall issue from any Court "not established by Royal Charter, to enforce "any judgment, decree or order of such "Court, unless some proceeding shall have "been taken to enforce such judgment, decree, "or order, or to keep the same in force, within "three years next preceding the application "for such execution."

At the time of the passing of this Act and down to the time of the Charter of 1862, the period within which execution of the decrees of the late Sudder Court could be had was governed by the 20th Section, and the period of limitation during which such decree could have been executed was three years. It would be a strange, and probably wholly unforeseen result of the establishment of the High Court as a Court of appeal, if the effect of Her Majesty's Charter for that purpose had been to alter the law for the limitation of suits on so important a point.

But let us see how the matter stands. I may observe that no general enactment appears to have been passed as regards the appellate side of the High Court declaring that provisions or Regulations and Acts relating to the late Sudder Court at the time of its abolition should be deemed to apply to the High Court on its appellate side. The 11th Section of the 24th and 25th Victoria, Chapter 104, refers only to provisions relating to the Supreme Court.

The 8th Section of the 24th and 25th Victoria provides that on the establishment of the High Court at Fort William in Bengal, the Sudder Dewanny Adawlut at Calcutta shall be abolished. By the 9th Section it was enacted that each of the High Courts to be established under that Act shall have all such jurisdiction, original and appellate, as Her Majesty may by Letters Patent direct, &c.; and subject and without prejudice to the Legislative powers in relation to the matters aforesaid of the Governor-General in Council, "the High Court shall have and exercise all "jurisdiction and every power and authority, "vested in any of the Courts of the same "Presidency abolished under this Act at the "time of the abolition of the said last mentioned Courts."

Now, if the High Court on its appellate side could now execute or cause to be executed its decrees within the limit allowed by Section 19 it would exercise a power which the Sudder Court never possessed.

The preamble of the Charter recites the provisions to which I have just referred. The 29th Clause ordains that with respect to the law to be applied by the High Court of

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Judicature to cases coming before it in the exercise of its appellate jurisdiction, such law shall be the law which the Court in which the proceedings were originally instituted ought to have applied to such case.

By the 37th Clause of the Charter of 1862, it was declared that the proceedings in civil suits of every description between party and party brought in the High Court "shall be "regulated by the Code of Civil Procedure "prescribed by Act VIII of 1859, and by "such further or other enactments of the "Governor-General in Council in relation to "Civil Procedure as are now in force."

If this 37th Clause had been repeated in the Charter of 1865 it would assist my argument. Such is not the case. But I may add that I cannot think that the omission of this Clause in the Charter of 1865 was intended to alter the law of limitation.

The enactment relating to the execution of decrees in appeal at the time of the publication of the Charter of 1862 was Section 20 of Act XIV of 1859, and I am of opinion that law became, on the promulgation of the Charter of 1862, instantly applicable as fixing the period of the limitation for the execution of decrees of the High Court on its appellate side.

The 19th Section of Act XIV of 1859 was intended to apply to the late Supreme Court,—a Court established by Royal Charter of a very different kind from the appellate Court established by the Charter of 1862,—a Court having a very extensive jurisdiction over Europeans resident in India and dealing with a population to some extent migratory, engaged largely in foreign trade and in adventures in distant countries.

The fact that an Appellate Court was established under circumstances which caused it to fall within the terms used in Act XIV of 1859 for the purpose of defining Courts like the late Supreme Court was a mere accident. I am of opinion that the 19th Section was never intended to apply and does not apply to decrees of the High Court on its appellate side; that the High Court on its appellate side is not such a Court established by Royal Charter as is contemplated by Section 19 of Act XIV of 1859; and if so, unless Section 20 applies, Act XIV of 1859 does not give any period of limitation within which decrees of the High Court on its appellate side must be executed.

On a careful consideration of the Acts and Charters, I am of opinion that when, under Section 361, a decree of the High Court on its appellate side is transmitted to the Court which passed the first decree in the suit for execution, it will have the effect of a decree of such Court, and must be executed within the period limited by Section 20 Act XIV of 1859.

This opinion is on both points in accordance with a judgment of the High Court at Madras in the case of Arunachella Thudayan *vs.* Veludayan, V Madras High Court Reports, page 215.

Loch, J.—I concur in the view taken by the Chief Justice. I have had to re-consider the subject, for on a former occasion I held that the provisions of Section 19 Act XIV of 1859 applied to decrees of the appellate side of the High Court; but it is clear that the High Court in its appellate capacity is only in the position of the late Sudder Court in regard to the disposal of appeals from the District Courts; and if a decree of the late Sudder Court made in appeal from the judgment of the Court below required to be executed under the provisions of Section 20 of Act XIV of 1859, the decree of the High Court on its appellate side with regard to the same class of appeals can have no higher position. Section 19 was enacted for the execution of decrees of the late Supreme Court and was not applicable to decrees passed by the Sudder Court, and the mere accident that the two Courts have been subsequently amalgamated and become one High Court does not alter the law as regards the execution of decrees made by the High Court on its appellate side. I concur in the answer proposed to be given by the Chief Justice.

Bayley, J.—The conclusion at which the Chief Justice has arrived appears to me to be the correct and proper one.

In every case, this Court on its appellate side by its decree orders and decrees either that the appeal be dismissed and the decree of the Lower Appellate Court affirmed,—or merely that the appeal be dismissed, which involves the consequence that the decree of the first Court be affirmed,—or this Court orders and decrees that the decree of the Lower Appellate Court be modified or reversed, as the case may be.

I do not think it can be said that any of such decrees of the High Court are only decrees of the Lower Appellate Court. There

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was apparently an omission to provide for the particular point when the late Sudder Dewanny and Nizamut Adawlut were amalgamated into the High Court; but the result could never have been contemplated, nor in fact is it a legal result that a decree-holder appealing to the High Court for execution from a Zillah Court decree should, merely by such action, obtain twelve years to execute his decree while in the Zillah Court he would only have three.

I would answer the questions in the view taken by the Hon'ble the Chief Justice.

Macpherson, J.—I am of the same opinion. I think the question is well disposed of by Sir Colley Scotland in his judgment in the case (V Madras Reports, page 217) referred to by the learned Chief Justice.

Mitter, J.—I am of the same opinion.

The first question referred to us does not admit of any difficulty whatever. Whether the decree of the Appellate Court is for reversing or for affirming the decree against which the appeal was preferred, it is in either case the final decree in the cause, and as such the only decree which is capable of being enforced by execution after it is once pronounced. If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone. If, on the other hand, it is affirmed by the Appellate Court, it is equally dead and gone, though in a different way; namely, by being merged in the decree of the superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously; for in that case the decree-holder would be entitled to demand execution in respect of both of them, and such a double execution in one and the same suit would be manifestly improper. Suppose the law were that Appellate Courts should execute their own decrees. There is nothing in this supposition to interfere with the fairness of the present discussion; for such a law might at any time be passed by the Legislature without affecting the principle upon which that discussion depends. Could it have been contended for one moment that the lower Courts would have been justified in executing the original decrees, whilst the Appellate Courts were executing their own? If, notwithstanding the confirmation of the decree of the lower Court by the Appellate Court, we hold that decree to be still in existence, what is to become of the decree of confirmation passed by the latter Court? Surely it is not to be treated as a nullity; and if not treated as a nullity, it must be treated as a decree capable of being enforced by execution, and therefore of superseding the decree in affirmance of which it was passed.

The second question, however, is one of considerable difficulty. But after giving to it my best and most earnest consideration, the conclusion I have arrived at is that a decree of the High Court in its appellate jurisdiction, whether it is for affirming or for reversing a decree passed by a subordinate Court in the mofussil, is subject, like the latter decree, to the 3 years rule of limitation prescribed by the 20th Section of Act XIV of 1859.

According to the true theory of appeals, the duty of an Appellate Court is to pass *the decree which ought to have been passed* by the Court from whose decision the appeal is preferred. The High Court, as a Court of appeal from the Courts in the mofussil, is no exception to this rule, as may be clearly seen from the 21st Section of the Letters Patent, which will be more specifically referred to hereafter. It would, therefore, be wrong in principle if we give to the decree of the Appellate Court any legal effect or operation which that decree, if passed by the Court of original jurisdiction, would not have possessed. An Appellate Court is nothing more than a Court of error, and its decrees ought, therefore, to be subject to the same rules and limitations as the decrees whose errors they profess to correct. The necessity for the existence of Appellate Courts arises entirely from an assumed want of confidence in the judgments of the Courts of original jurisdiction. But neither this necessity nor the cause from which it arises ought to make any difference whatever in the rights of the parties or in the mode in which those rights are to be enforced.

Section 21 of the Letters Patent of 1865 runs as follows:—

"And it is hereby ordained that with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction,—such law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case."

Suppose, therefore, that the law had required the appellate branch of the High

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Court to execute its own decrees. The cases arising out of such executions would have been undoubtedly entitled to take their rank in the category of "cases coming before the "High Court in the exercise of its appellate jurisdiction." What law of limitation, then, would the High Court have been obliged to apply to such cases? Surely the same law which "the Courts in which the proceedings "were originally instituted" would have applied to "such cases," that is to say, to cases arising out of the execution of their own decrees. It has been held over and over again, that proceedings taken in execution of a decree are nothing but continuations of the suit in which that decree was passed; so that there is no ground whatever for raising any verbal objections to the above conclusion in consequence of the use of the word "case" in the Section under our consideration. So far as the spirit of that Section is concerned, its applicability to the cases supposed above is too manifest to require any lengthy discussion. If "the law, equity and rule of good conscience" applicable to the execution of decrees passed by Courts of original jurisdiction be not "the law, equity and rule of good conscience" which the High Court would have been bound to follow in those cases, there is no other "law, equity and rule of good conscience" by which it could have guided itself; and the word "law" clearly includes the *law of limitation*. The High Court in the exercise of its appellate jurisdiction is bound to pass its decrees according to the "law, equity and rule of good conscience" prevailing in the Courts from whose decisions the appeals are preferred; and I do not see the slightest reason for holding that the framers of Section 21 intended to make the execution of those very decrees subject to a different "law or equity and rule of conscience."

It is true that decrees passed by the appellate branch of the High Court are required to be executed by the Courts which passed the original decrees. But this circumstance can in no way affect the validity of my conclusion. On the contrary, it affords an additional ground in support of it. I take it to be a general principle of law that all matters of procedure are subject to the *lex fori*. Section 362 of Act VIII of 1859, the very Section which requires the decree of the Appellate Court to be executed by the Court of first instance, recognizes this principle as far as it goes; for it says distinctly that all such decrees "shall be executed in the *manner and according to the rules hereinbefore contained for the execution of original decrees*." It is true, that the rules referred to in this Section are those which are laid down in the Code of Civil Procedure, and that they do not, therefore, include the law of limitation which forms no part of that Code. But a law of limitation, like the one prescribed in Act XIV of 1859 for the execution of decrees, is a part of the *law of procedure* in the most extensive signification of that expression; for it merely affects the remedy of the decree-holder, and not the right given to him by the decree, at least not directly. It is upon this ground that it has been held that causes of action arising in foreign territories are governed by the law of limitation prevailing in the Court in which they are sought to be enforced, and the same principle is also applicable to the decrees of our Civil Courts where they are sought to be executed out of the jurisdiction of the Courts by which they are passed. Section 287 of the Code of Civil Procedure says distinctly that when decrees of one Court are transmitted for execution to another Court of a different jurisdiction, they "*shall have the same effect as the decrees of the Court to which they are so transmitted*; and Section 288 enacts that "they shall be executed by such Court according to its *own rules in the like cases*." Why, then, are we to hold that the Courts which have to execute the decrees passed by the High Court in the exercise of its appellate jurisdiction, are to execute those decrees according to a rule of limitation different from that which is applicable to their own decrees, when the principle involved is precisely the same, and when we find that the principle has been recognized in every other respect by the express provisions of the 362nd Section of Act VIII of 1859?

Much stress has been laid upon the words "established by Royal Charter" used in the 19th Section of Act XIV of 1859. It has been argued that as the High Court is a "Court established by Royal Charter," all the decrees passed by it, whether in the exercise of its original jurisdiction or otherwise, must be subject to the 12 years' rule of limitation prescribed by that Section. It is clear, however, that that rule was intended by the framers of Act XIV of 1859 for the decrees of the late Supreme Court, whose place is now occupied by the High Court in its original jurisdiction; and there is nothing either in the Act of Parliament or in the Letters Patent by which the

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High Court was established, or in any other Act or Regulation passed since the promulgation of Act XIV of 1859, to show that *the original operation of that rule* has been extended to the decrees of the High Court in its appellate jurisdiction. On the contrary, it has been already shewn from the provisions of the 21st Section of the Letters Patent that the reverse is the case. Why then are we to adopt an anomalous construction the effect of which would be to render the decrees of an Appellate Court subject to a law of limitation different from that prescribed for the decrees of the Court of first instance, when that construction has not only nothing either in reason or in justice to recommend it, but when it is not even sanctioned by the intention of the Legislature?

It may be said that if Section 19 was not intended for the decrees of the appellate branch of the High Court, Section 20 also was not intended for those decrees. But the answer to this objection is four-fold. In the first place, it is beyond all contention that Section 20 was intended for the decrees of the late Sudder Court, and as the appellate branch of the High Court occupies the place of that Court in every respect, all its decrees must be subject to the law of limitation prescribed for the decrees of the Sudder Court in the absence of any specific legislative provision to the contrary. In the second place, even if it is admitted that Section 20 would not be directly applicable to the decrees passed by the High Court in the exercise of its appellate jurisdiction, those decrees would still be subject, according to the true theory of appeals, to the law of limitation prescribed by that Section, inasmuch as it is the law applicable to the decrees of the Courts in which the proceedings were originally instituted. The legitimate function of an Appellate Court being *to do nothing more than what ought to have been done* by the Court from whose decision the appeal is preferred, the decrees of the Appellate Court would, upon general principles, be subject to the same laws as those prescribed for the decrees of the Court of first instance, even if there were no express legislative provision on the subject. In the present case, however, it has been shewn from the 21st Section of the Letters Patent that this was clearly the intention of the Legislature. In the third place, the decrees passed by the High Court on its appellate side being required by law to be executed by the Courts of original jurisdiction, the latter Courts are bound, according to the general principle above referred to, to execute them according to the law of limitation applicable to their own decrees. In the last place, if we hold that the decrees passed by the High Court in the exercise of its appellate jurisdiction are subject neither to the provisions of Section 20 nor to those of Section 19, there is no other Section of the Limitation Act which can possibly apply to them; and the consequence would be that those decrees would have no law of limitation at all to govern their execution. Such a construction, however, would be not only unjust to the parties against whom those decrees are passed, but it would be also opposed to the intentions of the Legislature, so far as we can gather those intentions from the nature of the functions entrusted to the appellate branch of the High Court and the laws which have been enacted to regulate the exercise of those functions.

It has been said that the opposite view is strongly supported by the principle of the Full Bench case in which it was held that the decrees of the Privy Council are not subject to any law of limitation. I do not wish to express any opinion as to the correctness or otherwise of that decision. But without pledging myself to the soundness of all the reasoning employed by the learned Judges by whom it was passed, it is sufficient for the

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purposes of the present argument to say that that case is clearly distinguishable from the one now before us. A decree of the Privy Council is not in the nature of a decree passed by an ordinary Court of Justice. It is, in fact, a command of Her Majesty the Queen, and the chief reason upon which the case referred to was decided was that no Act or Regulation passed by the Indian Legislature could interfere with Her Majesty's prerogative to have that commad executed without reference to any conditions of time not expressly included in it.

The 18th July 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, J. B. Phear, Dwarkanath Mitter, and W. Ainslie, *Judges.*

Jurisdiction — Appeal — Plaint — Stamp—Sections 30 and 36 Act VIII of 1859—Note (b) Article B Act XXVI of 1867.

Case No. 94 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 22nd November 1870, *reversing a decision of the Moonsiff of that District, dated the* 18*th August* 1870.

The Collector of Sylhet (one of the Defendants) *Appellant,*

versus

Kalee Coomar Dutt and others (Plaintiffs) *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Doorga Mohun Dose for Respondents.

Whenever a plaint is rejected under the provisions of Section 30 of Act VIII of 1859 on the ground that the amount or estimated value of the claim, as stated by the plaintiff, is beyond the jurisdiction of the Court, an appeal is given by Section 36 from the order rejecting the plaint, notwithstanding note (*b*) to Schedule B of the Stamp Act XXVI of 1867, which cannot repeal by implication the provisions of Act VIII of 1859.

This case was referred to the Full Bench by E. Jackson and Onoocool Chunder Mookerjee, J. J., with the following remarks :—

Jackson, J.—In this case a preliminary objection was raised before the Moonsiff as to jurisdiction. It was alleged by the defendant that the claim had been under-valued and that the plaint if properly valued should be filed before the Subordinate Judge of the district. The Moonsiff enquired into the valuation and came to the decision that the claim was under-valued, and he accordingly returned the plaint to the plaintiff. The plaintiff appealed to the Subordinate Judge who came to a different conclusion upon the evidence, and thinking that the Moonsiff had jurisdiction remandad the case to the Moonsiff for trial.

This special appeal is on the point that the Moonsiff's orders on the subject of valuation are final under note (*b*) attached to Schedule B, Act XXVI of 1867, and that it follows that his decision on the question of jurisdiction is consequently virtually final also, inasmuch as taking the Moonsiff's valuation the question of jurisdiction is disposed of. In support of this view, we have been referred to several precedents of this Court to be found in the 13th Weekly Reporter, pages 327 and 415, and in the 6th Bengal Law Reports, pages 11 and 12.* This Bench passed the decision at page 12

* 14 W. R., pp. 381 & 451.

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of the Bengal Law Reports,* but on re-consideration we are inclined to doubt the correctness of the judgment we then arrived at. It seems to us that the proper construction to be placed upon the note to Schedule B of Act XXVI of 1867, is that when the case is admittedly one within the jurisdiction of the Court in which the suit is brought, the exact amount of stamp required may be determined by that Court, and its decision is final. This would appear from the last sentence in that note, which directs that if the valuation is found to be excessive the excess shall be returned, and if deficient, the deficit shall be put in before the case proceeds any further. These directions would not apply when the decision of the Moonsiff was that the valuation took the case beyond his jurisdiction. If this is the correct interpretation to be put upon this law, it will do away with the forced construction put upon this portion of the law in the decision in the 13th Weekly Reporter, page 415, *viz.*, that by it Sections 31 and 36 of the Procedure Code are virtually repealed, though there is no repealing enactment to that effect. And there will be an end also of the other difficulty which must follow if the former view of the law is correct, *viz.*, that when the Moonsiff and Subordinate Judge take different views of the valuation of a suit, as in this case, the decision of each as to the institution of the suit in his Court is final, and the plaintiff has no remedy.

We are asked to refer the question to a Full Bench, and we think that this is the proper course to adopt.

The judgment of the Full Bench was delivered as follows by

Norman, C. J.—In this case, Woodoy Chand Dutt, the plaintiff, brought a suit in the Court of the Moonsiff of Lushkerpore in the district of Sylhet for some lands, valuing his rights at rupees 82-1-4 pies.

A preliminary objection was raised by the Collector of Sylhet on the part of Government, the defendant in the suit, to the effect that the Moonsiff had no jurisdiction, the property having been under-valued. The Moonsiff made a local enquiry and finding the value of the property in suit to be rupees 2,250, which was beyond his jurisdiction, returned the plaint to the plaintiff in order that it might be filed in the Subordinate Judge's Court on a stamp for rupees 2250.

The plaintiff appealed to the Subordinate Judge against the order of the Moonsiff rejecting the plaint on the ground that the value of the claim, the subject-matter of the suit, was beyond his jurisdiction under the provisions of the 36th Section of the Code of Civil Procedure, Act VIII of 1859. The Subordinate Judge entertained the appeal and tried the question of the valuation of the property. He found that the value of the claim was rupees 500, and accordingly reversed the order of the Moonsiff which rejected the plaint. He directed the Moonsiff to receive the plaint upon a valuation of rupees 500 and to try the case upon the merits.

From that decision a special appeal was presented to this Court, and the objection taken was that no appeal lay from the decision of the Moonsiff as to the market value of the property in suit. The appellant relied on a note to No. 11 of Schedule B, Act XXVI of 1867, which provides that "in order to ascertain the market value or annual net profits of any such property as is described in note 'A' and in note 'B,' the Court may, either of its own motion or on the application of any party to the suit, issue a commission to any proper person, directing

* 14 W. R., p. 451.

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"him to make such local or other investiga-
"tion as may be necessary and to report
"thereon to the Court, and the decision of
"the Court as to the market value or annual
"net profits shall be final."

The case came before a Division Bench of this Court, Justices Elphinstone Jackson and Onoocool Chunder Mookerjee, who finding that there had been two decisions to the effect that in such cases no appeal lies from the determination of the first Court as to the value,—one of them being reported in Volume XIII, Weekly Reporter, page 415, and the other in the 6th Bengal Law Reports, page 12 of the Appendix,*—referred this case for the opinion of a Full Bench.

We are of opinion that whenever a plaint is rejected under the provisions of Section 30 of Act VIII of 1859 on the ground that the amount or estimated value of the claim, as stated by the plaintiff, is beyond the jurisdiction of the Court, an appeal is given by Section 36 from the order rejecting the plaint. We think it clear that the provisions in the note to the Stamp Act XXVI of 1867, which was passed for a totally different purpose, namely, to prevent appeals upon questions of stamp duty where the sole question is as to the amount of stamp to be impressed on the plaint, cannot have the effect of repealing by implication the provisions of the Code of Civil Procedure, which in clear and distinct terms give a right of appeal where a plaint is rejected upon the ground that it is under-valued. We think it clear that whenever, for the purpose of determining the question whether or not the lower Court was right in rejecting the plaint upon the ground that it had no jurisdiction to entertain the suit, it becomes necessary to try what is really and truly the value of the property in suit, the Court which has to determine the appeal upon the question of jurisdiction has incidentally power to determine all those questions of fact which are necessary to enable it to arrive at a satisfactory determination on the question of jurisdiction. We think, therefore, that there is no doubt that an appeal to the Subordinate Judge lay in the present case, and for the purpose of determining that appeal the Subordinate Judge had the power to enquire into and determine the question of the value of the property in suit. Were it otherwise, the greatest possible inconvenience would result. If a plaint had been presented to the Moonsiff, and the Moonsiff had tried the question as to the value of the property and had decided that he had no jurisdiction, he would, of course, dismiss the suit. Suppose then the plaintiff, being unable to appeal, to have presented his plaint to the Court of the Subordinate Judge, and the defendant had there objected that the valuation was not such as to give to the Subordinate Judge jurisdiction. It is easy to imagine cases in which that course would be open to a defendant notwithstanding an objection made by him to the valuation in the lower Court. If the objection on the part of the special appellant is well founded it would become the duty of the Subordinate Judge to take up and try the question of valuation and his decision also would be final, and therefore there would be a final decision that the suit could not be maintained in the Moonsiff's Court and also a decision equally final that the suit could not be maintained in the Subordinate Judge's Court, which would lead to a practical absurdity and the greatest inconvenience.

The result of this decision is that the appeal will be dismissed with costs. The respondent will be allowed full costs both in this Court and before the Division Bench.

14 W. R., p. 451.

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The 8th June 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Pre-emption—Tulub-i-ishaad.

Case No. 174 of 1870.

Regular Appeal from a decision passed by the Judge of Patna, dated the 1st June 1870.

Mussamut Jumeelun and another (two of the Defendants) *Appellants,*

versus

Luteef Hossein (Plaintiff) and another (Defendant) *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

It is not a binding rule of law that the *tulub-i-ishaad*, if made within a day after the receipt of intelligence of the purchase, necessarily is in time for the preservation of the right of pre-emption: the due and sufficient observance of that formality, as to time, is a question to be decided in each case by the Court which has to deal with the facts.

This case was referred to the Full Bench by L. S. Jackson and A. G. Macpherson, J. J., with the following remarks :—

Jackson, J.—We are not inclined to think there is much force in the remaining objections urged by Mr. Twidale, or that on this part of the case we ought to disturb the judgment of the Court below ; but the first matter which was argued, namely, the question on which the Judge, although inclined to come to a different conclusion, considered himself bound by the decision of the High Court referred to in the VI Weekly Reporter, page 173, is a point of considerable importance in regard to this class of cases, and is a point on which we should hardly feel ourselves at liberty to decide in the sense in which we are at present inclined to decide it, without referring the question to a Full Bench.

It appears to us that the Division Bench of this Court in 1866 could hardly have intended to hold that as a matter of law a person claiming a right of pre-emption must be held to be in good time if he completed the formality of *tulub-i-ishaad* within one day after he heard of the purchase to which he objects, but that the Court which has to deal with the facts must be at liberty in each case to determine whether the *shaffee* has complied with the dictates of Mahomedan Law in carrying out the *tulub-i-ishaad* with proper diligence and promptitude. But as the case in question is certainly capable of bearing that construction, and as it is based on a ruling of the late Sudder Court passed in 1857, to be found in the first Volume of the Reports of that year, page 454, it appears to us advisable to refer this question to the Full Bench. The question is whether it is a binding rule of law that the *tulub-i-ishaad*, if made within a day after the receipt of intelligence of the purchase, necessarily is in time for the preservation of the right of pre-emption,—or whether the due and sufficient observance of that formality, as to time, is not a question to be decided in each case by the Court which has to deal with the facts. The case will therefore be referred for a decision on this point to a Full Bench.

The judgment of the Full Bench was delivered by

Norman, C. J. (*the other Judges concurring.*)—This case has been submitted to a Full Bench in consequence of two decisions—one reported in Volume VI of the Weekly Reporter, page 173, and the other in the Sudder Decisions for 1857, Volume I, page 454 ; in both which cases it was held that a delay of one day in making the *tulub-i-ishaad* when a Mahomedan is making a claim for pre-emption is not such a delay as to interfere with or prejudice the plaintiff's right to pre-emption under the Mahomedan Law.

Mr. Justice L. Jackson and Mr. Justice Macpherson have referred the following question to this Court :—

" Whether it is a binding rule of law " that the *tulub-i-ishaad*, if made within a " day after the receipt of intelligence of " the purchase, necessarily is in time for the " preservation of the right of pre-emption,— " or whether the due and sufficient observ- " ance of that formality, as to time, is not a " question to be decided in each case by the " Court which has to deal with the facts."

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Now we may observe that in the case in the Sudder Reports of 1857, Mr. Trevor and Mr. Money—who were the Judges forming the majority of the Court—admitted that the *futwa* of the Cazee-ool-Cozat on which they acted was not in accordance with the rule laid down by Sir William Macnaghten. That rule, which as we think is correctly stated, is as follows :—" It is " necessary that the person claiming the " right of pre-emption should declare his " intention of becoming the purchaser imme- " diately on hearing of the sale" (which we may observe is the *tulub-i-moasibat*) " and " that he should, *with the least practicable* " *delay*, make affirmation by witness of such " his intention either in the presence of the " seller or of the purchaser, or on the pre- " mises."

The rule, then, stated by Sir William Macnaghten is that the *tulub-i-ishaad* should be made *with the least practicable delay*. Now, on referring to the authorities on Mahomedan Law which have been brought before the Court by Mr. Twidale, it is clear that the rule is one fairly deducible from those authorities.

The first to which we may refer is Baillie's Digest of Mahomedan Law. At page 483 he says—" The making of this demand " (of pre-emption) is measured by the ability " to do so. And when one is able to make " the demand in the presence either of the " purchaser or the seller (though only by " letter or a messenger) and fails to do so, " the right of pre-emption is annulled, to " prevent injury to the purchaser. If he " (that is the claimant) leave the nearest to " go to one more remote, all being in the " same city, the right is not annulled on a " favorable construction ; otherwise, if the " more remote be in another city or in one " of the villages belonging to the same " city."

It is plain, therefore, that if the pre-emptor, instead of going to the persons who reside nearest to him, goes either to the seller or purchaser who lives in another city at a distance, without taking care to give prompt notice to one that is nearest, he loses his right.

There is also a passage cited by Mr. Twidale from the *Inayah*, a commentary on the Hedaya, which is thus spoken of by Mr. Morley in his Digest of Indian cases. He says that it was written by Shaikh Akmal-od-din Mahomed Ben Mahmud, who died in the Hijree year 786, A. D. 1384, and adds " the Inayah is much esteemed for its studious analysis and interpretation of the text." In that book, Volume IV, page 251, commenting on the last line of the 1st paragraph, page 573 of the Hedaya, where the author of the Hedaya is speaking of the delay of the litigation, the Commentator says :—" Nehaya says from Zukh- " eera that when the Shuffee is absent and " afterwards was informed of the sale, then " he should make moasibat, and after that " he should get" (that is, be allowed) " so " much time as will enable him to go to the " purchaser or seller of the property for " ishaad ; but if this time has expired, and " he did not himself go, or send some one, " then the shuffa is invalid."

Mr. Samuells, the Judge who was in the minority when the case was before the Sudder Court, puts the rule, as it appears to us, upon the true ground. He says :—" The " futwa of the Law Officer is quite irre- " concileable with the principles stated by " Macnaghten, and no authority is given for " the doctrine which it enunciates on the " subject of the tulub-i-ishaad. It is the " opinion of the Law Officer apparently that " tulub-i-ishaad may take place at any " time subsequent to the tulub-i-moasibat " within the period of limitation. Were " this the law of pre-emption, no purchaser " of property from a Mahomedan would be " safe ; for tulub-i-moasilat may be, and " constantly is, a private act which the pur- " chaser against whom the right is claimed " has no power of questioning or refuting, " and the tulub-i-ishaad is the only public " act connected with the claim to pre-emp- " tion of which the purchaser has neces- " sarily any cognizance. It appears to me " clear from the text-books that the tulub- " i-ishaad is the public affirmation of the " tulub-i-moasibat, and that it must take " place as soon after the shuffee has heard " of the sale and pronounced the tulub-i- " moasibat as he can procure witnesses and " proceed to the premises, or to the presence " of the seller or purchaser. What may be " the 'least practicable delay' in such cases is " matter of evidence. The Court must de- " cide in each case whether due diligence " has been used or not."

We are of opinion, then, that the first branch of the question put to this Full Bench must be answered in the negative, and the second in the affirmative.

The case will go back to the Division Court for final orders.

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APPEALS FROM ORIGINAL JURISDICTION.

The 15th March 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Limitation—Promissory note—Sunday—Clause 9 Section 1 Act XIV of 1859.

On Appeal from the judgment of the Hon'ble G. C. Paul, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Tara Chand Ghose (Defendant) *Appellant*,

versus

Moonshee Abdool Ali (Plaintiff) *Respondent*.

The Advocate General and *Lowe* for the Appellant.

Hyde for the Respondent.

The day on which a promissory note payable on demand is made should be excluded in computing the period of limitation.

The word "time" as used in Clause 9 Section 1 Act XIV of 1859 is equivalent to "date" or to "day of date."

Quare.—When the last day for the presentation of a plaint falls on a Sunday, can the plaint be presented on the following day?

In this case, the plaintiff sued on a promissory note, payable on demand, dated the 14th November 1867. He filed his plaint on the 14th November 1870, the day on which the High Court re-opened after the Dusserah vacation. At the hearing before Paul, J., Lowe for the defendant contended that the note being one which was payable on demand, the date of the note should be included in computing the period of limitation, and that the suit was barred under the Statute of Limitations. The learned Counsel cited Rajkisto Roy *vs.* Dinobundoo Surmah, 3 W. R., S. C. Ct. References, 5; Norton and Ellam, 2 Meeson and Welsby, 461; Hempammal *vs.* Hanooman, 2 Madras H. C. Reports, 468; Christie and Fonsick, 1 Selwyn's Nisi Prius, 372, 11th Edition; Rex *vs.* Adderley, 2 Douglas, 463; 1 Jarman on Wills, 39, 3rd Edition; Lester *vs.* Garland, 15 Vesey, 257; Bellairs and Hester, 1 Lord Raymond's Reports, 280; and Anonymous, 1 *idem*, 480; Grant and Grant, 4 Younge and Collyer, 256; 2 Stephen's Commentaries, 280; Anonymous 1 Salkeld, 44.

As the defendant called no evidence, Hyde for the plaintiff was not permitted to address the Court, but referred the Court to the following cases, on which Lowe commented in reply.

Ex parte Krishna Padhe, 6 Bombay H. C. Reports, 50; Lakshuman Sakharam *vs.* Ranu Bin Sidoji, 6 *idem*, 51; Isaacs *vs.* The Royal Insurance Company, 5 L. R., Exch., 300; Ramonee Soonduree Dossia *vs.* Punchanun Bose, 4 W. R., 105, Civil Rulings; Radha Monee Chowdhrain *vs.* Bungshee Mohun Doss, 4 W. R., 30, Act X Rulings; In the matter of Palamyaudy Pillay, 4 Madras H. C. Reports, 330; and Mundy Chinna Comarappa Setti *vs.* Ramasawmy Setti, 4 *idem*, 409.

The judgment of Paul, J., was in the following terms :—

This is a suit on a promissory note dated 14th November 1867, payable on demand. The plaint was filed on the 14th November 1870. The defendant, who is not personally present, through his Counsel contends, firstly, that he never made the promissory note, and secondly that if he made it the action founded on it is barred by limitation. On the first issue, I have no difficulty in finding on the evidence that defendant did make the promissory note. On the second issue Mr. Lowe has raised a point which appears to me to be of a very elementary character, *viz.*, that in an action on a note payable on demand the cause of action arises when the note was made. I think the learned Counsel on the other side, without in the slightest degree endangering his case, might readily concede thus far. Starting from this position,

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Mr. Lowe has contended that the three years prescribed by law for bringing an action from the time the cause of action arose, expired on the 13th November, and that plaintiff was too late in filing his plaint on the 14th November. It is admitted that the 13th of November was a Sunday. I am of opinion on both points against Mr. Lowe's contention. I am of opinion that the 13th November was a *dies non*, and assuming that the plaintiff's three years expired on that day the plaintiff was entitled to file his plaint on the next day, *viz.*, on the 14th November. On this point Archbold's Practice has been referred to, and following that authority it is quite clear that when a party has to perform an act by a certain day and the last day falls on a holiday and when the Court is shut, he is entitled to come to Court on the following day. Against this position a decision of a Full Bench, reported in the 3rd Volume of the Weekly Reporter, Small Cause Court References, page 5, is cited. That case rules that under Act XIV of 1859 a suit is barred by limitation where the time for its institution expires on a holiday. The learned Chief Justice seemed to think that the period having been fixed by Statute the Court had no discretion to extend the time. With the greatest deference, I think that I am not called on to extend the time, but merely to consider whether the practice in this country and in England in cases of this sort should be followed or not.

In the 6th Bombay High Court Reports, page 50, I find it laid down that when the last day for presenting an appeal falls upon a Sunday or close holiday, an additional day is to be allowed for the presentation of the memorandum of appeal. I think that the same principle must apply to a plaint. That case is a clear authority in support of the view which I take, that supposing the last day falls on a holiday, a party is entitled to come into Court the next day.

With regard to the second branch of the proposition, I think that the plaintiff is not barred by limitation, but that he was in time on the 14th of November. The case in the next page of the 6th Volume of the Bombay High Court Reports to which I have already referred is a decision of Sir Richard Couch, the Chief Justice of this Court, who was then the Chief Justice of Bombay. It was there held that the date on which a debt becomes payable is to be excluded in calculating the period of limitation. I think that is a correct view of the law and follows the words of the Act, which are "the period of three years from the time when the debt became due, &c." Now it is admitted that the debt was due on the 13th November and three years from that time is the 14th of November. It is said that the law does not allow us to take notice of fractions of a day. Admitting that to be so, I am not bound to compute the time from any particular portion of the 13th November, the day on which the debt became due, and the plaintiff was therefore well in time on the 14th November 1870.

I am glad I am able so to construe the law in this case as to prevent what I must consider a dishonest defence from succeeding. It is said that, because the law allows a defendant to shelter himself under a plea of limitation, therefore the defence is not dishonest. The law, no doubt, allows a defence of this kind to be set up with a view to prevent the agitation of stale demands, but there is nothing in the law which contravenes the principles of morality which are set at defiance by an individual who, taking advantage of a doubtful interval of 24 hours, unblushingly endeavours to avoid thereby the payment of a just debt.

For the reasons I have given, I decree the amount sued for to the plaintiff with costs on scale No. 2.

The Advocate General and Lowe appeared for the appellant, and in addition to the cases relied on in the first Court, cited Castle and Burditt, 3 Term Reports, 623; Webb and Fairmaner, 3 Meeson and Welsby, 473; Fenton and Emblers, 3 Burrows, 1279.

Hyde for the respondent was not called on.

The Court delivered the following judgments:—

Phear, J.—This appeal turns upon a very small point. The question for us to determine is shortly this, namely, what is the precise meaning of the words of Clause 9 of Section 1 Act XIV of 1859 "the period of 3 years from the time when the debt became due." Mr. Graham argued that these words must have regard at least to the exact minute when the promissory note payable on demand was made by the defendant, so that a portion of the day upon which the note was made must be reckoned in the

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period of three years. I think that this is not so. It seems to me that the word "time" as there used is equivalent to "date" or to "day of date;" and it has been decided in very many cases that when the period is limited from the date or from the day of date it does not commence to run until the day has expired. I think therefore that in the present case, the period of limitation did not commence to run until midnight between the 14th and 15th of November 1867. The suit was brought on the 14th November 1870, and was therefore brought on the last day of the period of three years which commenced at midnight between the 14th and 15th of November 1867. In other words, it was brought within the period of three years prescribed by the Clause of the Limitation Act to which I have referred.

I think therefore that the appeal should be dismissed with costs on scale No. 2.

While I say on these grounds that the appeal should be dismissed, I desire to abstain from expressing my concurrence in the judgment of the learned Judge below so far as regards the value of Sunday in reckoning the period of limitation.

Norman, C. J.—I gave judgment on a former occasion to the same effect in a case argued by Mr. Macrae before me, and I have not heard any thing to induce me to change my opinion.

The 5th June 1871.

Present:

The Hon'ble J. B. Phear and A. G. Macpherson, *Judges.*

Hoondee—Endorsement—Acceptance—Forgery.

Appeal from the judgment of the Hon'ble G. C. Paul, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Thakoor Doss (Plaintiff) *Appellant,*

versus

Futteh Mull (Defendant) *Respondent.*

Marindin and *Evans* for the Appellant.

The Advocate General and *Lowe* for the Respondent.

The plaintiff was the purchaser and owner of a hoondee from the holder or person who had deposited the consideration money; and he endorsed the same for realization only. The defendant was the purchaser of the hoondee (after it had been lost or stolen) by means of a forged special endorsement to his vendor before acceptance and a forged endorsement to himself after acceptance. The question was whether the defendant, by reason of having been a purchaser for valuable consideration without notice of his vendor's want of title, obtained a good title to the hoondee, notwithstanding the two forgeries. HELD that, in considering the right to a hoondee, a reasonable construction must be put upon the words of an endorsement or acceptance just as much as upon any other part of the document; and when a Hindoo maker or rightful owner of a hoondee payable in terms to the *shajoog* or a respectable holder thereof, endorses it as sold or sent to A, he obviously means to pass the right of dealing with the hoondee to A alone; and that after a special endorsement to A, the hoondee cannot be validly transfered to B otherwise than by A or by A's authority.

Semble.—There is no rule of Hindoo law, customary or otherwise, which would have the effect of making the word *shajoog* mean payable to *bearer*, quite independently of the endorsements; nor any principle of mercantile expediency, having the force of law or otherwise, which would be served by disregarding the direction of the endorser, and treating a specially endorsed and specially accepted hoondee as if it were an English negotiable instrument made payable to bearer.

THE plaintiff in this suit alleged that between the 1st and 10th of Magh 1926, Dabeeram Ameechund of Bhowanee endorsed to their firm for value a certain hoondee drawn at Bhowanee by Chuttoorbooj Moorleedhur in favor of the said Dabeeram Ameechund on the firm of Koonjaloll Byjeenauth of Burrabazar in Calcutta, for the sum of Sicca Rs. 2,300 and bearing date the 1st day of the dark side of the moon in Magh 1926, and payable 61 days after date. The plaintiff thus became the owner and proprietor of the hoondee and he endorsed the same for the purpose of realization only, and forwarded it to the banking firm of Ramloll Buddree Doss of Calcutta for realization, but it was lost or stolen between Delhi and Calcutta, and never reached the hands of Ramloll Buddree Doss, who thereupon gave notice to the plaintiff of the loss, and on the 12th February 1870 had a letter sent through his attorney to Koonjaloll Byjeenauth, in which notice was also given to them of the loss of the hoondee, and they were warned that if they paid the amount of the same to any person except to Ramloll Buddree Doss they would be held liable for all losses and costs arising to them and all persons *bonâ fide* interested therein and that they would moreover be liable to pay the amount thereof over again.

The plaintiff then stated that, on hearing of the loss of the hoondee, he procured a duplicate of it from the drawers and endorsers, and forwarded the duplicate also to Ramloll Buddree Doss, who thereupon presented the same for payment to Koonjaloll Byjeenauth, who replied that they had accepted

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the original hoondee in favor of Urjoon Doss Hazareemull before the receipt of the letter of the 12th ultimo, and the acceptors stated that Ramloll Buddree Doss were well aware of that, and they added that the hoondee was then in the hands of Soorujmull Sahoymull.

On receipt of the acceptors' reply, Ramloll Buddree Doss sent a letter through his attorney to the firm of Urjoon Doss Hazareemull in whose favor Koonjaloll Byjeenauth alleged themselves to have accepted the hoondee, enquiring whether they had presented the same for acceptance, but Urjoon Doss Hazareemull denied all knowledge of the hoondee. A letter was thereupon addressed again to Koonjaloll Byjeenauth informing them that Urjoon Doss Hazareemull denied that they had presented the hoondee for acceptance to them and the duplicate hoondee was a second time submitted to them for payment, Ramloll offering to grant them an indemnity holding them harmless and indemnified against any one who may compel them to pay the money over again on the original hoondee. No answer was received to that communication by Ramloll Buddree Doss who were unable to obtain any further information in respect of the hoondee.

The plaintiff then charged that the hoondee was at the due date thereof, and was still at the time of the institution of the suit, in the hands of the defendant's firm of Soorujmull Sahoymull, from whom he demanded the hoondee; but the defendant having refused to deliver it to the plaintiff and also to disclose from whom and how he got it, or why he retained it, the plaintiff brought this suit praying that the defendant might be ordered to deliver up to him the said hoondee or to pay the value thereof.

The Hoondee in question was in these terms:—

Signed Mohun Doss, accept and pay this Duplicate. Duplicate sold by Daberam Ameechund to Bhya Mutta Woolla Mull Thakoor Doss.

Stamp
12 annas.

Mutta Wolla Mull Thakoor Doss send Hoondee of which this is the Duplicate of Bhoie Ramloll Buddree Doss for realization on his own account.

1 Nursinghjee.

1.—Written by Chutteorbhooj Meorlee-dhur of Bhowanee to Sha Koonjaloll Byjeenauth at the auspicious port of Calcutta whose salutations you will accept, further we draw one hoondee on you for rupees 2,300 in letters two thousand three hundred, the half of which being eleven hundred and fifty, the double of which being the whole amount, was deposited here by Daberam Ameechund on Tuesday, the first day of the dark side in money payable sixty-one (61) days after date in current hoondee rupees. The depositing Dhunee says the hoondee is lost, if that hoondee is lost after examining your books carefully accept this duplicate and pay its value, in case the hoondee has been accepted this duplicate is null; read it and tear it up. We have written two sunnuds of which we will give credit for one only; this duplicate is written on the 10th day of the light side of the moon in Maugh, Sumbut 1926.

(on the back)

Duplicate.

74-1.—To Sha Koonjalolljee Byjeenauth.

The defendant answered that on the evening of the 12th Maugh 1927—8th January 1870, a broker named Ram Kisto came to his cootee and asked Kaisree Chund, the managing gomastah of the defendant's cootee, whether he would discount two several hoondees for sicca rupees 2,300 each, one drawn upon and accepted by Koonjaloll Byjeenauth (the hoondee in dispute in this suit) and the other drawn upon and accepted by Nursing Doss Hur Doss, which were in the hands of Urjoon Doss Hazareemull who would receive the amount. Kaisree Chund agreed to make the discount, and the bargain was then struck and the broker went away. Later in the same night, a person calling himself Jaunkee Persaud came to the defendant's cootee and represented to Kaisree Chund that he was a jemadar in the service of the cootee of Urjoon Doss Hazareemull, and at the same time handed over to him two hoondees. Kaisree Chund in order to ascertain the genuineness of these acceptances sent these hoondees to the respective cootees of Koonjaloll Byjeenath and Nursing Doss Hur Doss, both of whom inspected their respective hoondees and acknowledged their acceptances. Kaisree Chund upon being satisfied with the truth of these acceptances paid rupees 4,856-1 to the person calling himself Jaunkee Persaud deducting the discount

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at the rate of rupees 7-8-0 per cent. per annum.

The defendant proceeded to state that on or about the 17th February 1870 it was reported in the Bazar that these two hoondees had been stolen on transit and that the firm of Ramloll Buddree Doss had given notices to the acceptors not to pay them on maturity. Kaisree Chund on hearing this report sent his jemadar to the cootee of Urjoon Doss Hazareemull to ascertain what the facts were. The jemadar saw Mungul Chund, the head gomasta of Urjoon Doss Hazareemull and asked him about these hoondees, whereupon he stated that he knew nothing about them.

On the 21st March the hoondee drawn upon and accepted by the cootee of Koonjaloll Byjeenath became due, but was not paid by Koonjaloll Byjeenath inasmuch as he alleged that he had received notice not to pay the same. The plaintiff's attorney caused the same to be presented to the cootee of Koonjaloll Byjeenath and demanded payment thereof; when their head gomastah, Juggernath, declined to pay the same stating as a reason that this hoondee had been stolen, whereupon the same was protested for non-payment.

On the 18th of March last the hoondee drawn up and accepted by the cootee of Nursing Doss Hur Doss became due and the defendant again through his attorney caused the same to be presented to Nursing Doss Hur Doss and demanded payment thereof, but their head gomastah Jaitmull declined to pay the same, stating the same reasons as had been given by Koonjaloll Byjeenath, whereupon that hoondee was also protested for non-payment.

On the same day notice of dishonor was also given to the cootee of Urjoon Doss Hazareemull to which a similar reply was received as in the case of the first hoondee.

The defendant further stated that no notice of the loss of the hoondee, the subject of this suit, was advertised in any of the newspapers of Calcutta or of the Upper Provinces, and the defendant at the time he took the same and until the time of the rumour mentioned was wholly ignorant that it had been stolen on its transit. He contended that as the hoondee on the face of it appeared *payable to the holder* and not payable to any particular person or persons, he was justified under the circumstances in discounting it and paying the amount to Urjoon Doss Hazareemull without making any enquiry as to its previous endorsements.

The judgment of the lower Court from which the appeal was laid was as follows:—

Paul, J.—In this case plaintiff sues defendant to recover back a certain hoondee or its value. The hoondee is in the ordinary form drawn by certain persons on Koonjaloll Byjeenauth and payable to a respectable holder thereof. This hoondee seems to have been purchased by the plaintiff's firm with the intention of sending it down to Calcutta from Delhi where they are carrying on business to the firm of Ramloll Buddree Doss, their constituents in Calcutta, for realization on their behalf. The plaintiff and his son have satisfactorily proved that the hoondee was purchased by the plaintiff's firm and that it was purchased with the intention of despatching it, and they kept a memo. of all the hoondees which were despatched. On the 24th January they say they enclosed this hoondee in a letter and they believe it was despatched on the same day. There is no direct evidence to show that the letter containing the hoondee was actually despatched, but from all the circumstances of the case I am led to believe the original intention of despatching it was carried out. The only two endorsements on the hoondee at the time the plaintiff says it left his hands were first the endorsement of the purchase by the plaintiff, and secondly the endorsement of the plaintiff himself with the words added "sent to Bhaie Ramloll Buddree Doss for realization;" the plaintiff and his son both swear that the name of Ramloll Buddree Doss was on the hoondee when it was enclosed in the letter, that this is the identical hoondee which they purchased and that in place of the words "Ramloll Buddree Doss" there is now the name of the firm "Urjoon Doss Hazareemull." Now the plaintiff's firm were not in the habit of doing business with Urjoon Doss Hazareemull and they could not have made the endorsement in favor of Urjoon Doss Hazareemull; consequently I connot but accept statement of the plaintiff and his son that the endorsement was to Ramloll Buddree Doss in the first instance, and the words Urjoon Doss Hazareemull have been substituted for Ramloll Buddree Doss by the latter name being expunged and the former name being written in its place. On looking at the hoondee carefully there appears to be a rubbing out, but not an ordinary erasure and it is probable

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some chemical process was used to effect that. But the change of name indicated on the back of the hoondee though manifest to a scrutinizing eye during the day is not palpably so, and would not be noticed when the hoondee is seen at night. That being so, it is obvious that at night when shroffs or native bankers invariably transact their hoondee business, with the aid of very common and not over bright lights, the altered appearance of the endorsement would not manifest itself or be detected and more especially by an old man such as the defendant's gomastah Kaisree Chund is. Therefore on this part of the case, wholly believing the plaintiff that the alteration was made, I consider that the alteration is one that the defendant could not and would not find out. Kaisree Chund however says that he did not examine the hoondee carefully and that he only looked at and trusted the endorsement (so to speak) on the face of the hoondee. His doing so cannot form matter of complaint because the acceptance was in favor of a respectable firm by another respectable firm to whom Kaisree Chund sent to enquire if their acceptance was genuine, and on being satisfied on that point, he had every reason to believe that the previous endorsements were true. I cannot believe that he would have paid a large sum on a hoondee the genuineness of which he had the slightest reason to doubt. The payment of a large sum of money on the hoondee is a cogent reason for believing the *bona fides* of the transaction on the part of the defendant in the absence of any thing to the contrary. I am satisfied that full value was given by the defendant for the hoondee and there is no shadow of suspicion that there was any improper dealing with the hoondee by the defendant at the time of the payment under discount and transfer to him. I therefore hold that the defendant is a *bonâ fide* holder for value and without notice.

Then that being so, has the plaintiff shown any thing which entitles him to recover this hoondee from the defendant? Now the plaintiff's contention is composed of various branches which I proceed to consider. The plaintiff contends that any body taking the hoondee must take it according to the import of the hoondee itself. I do not think that is so exactly. I think it is the acceptor who has to pay to a respectable holder. But however that may be, assuming that the term respectable holder is applicable to every transferer and transferee, and that every transferee must acquire his title from a respectable holder, I do not think there is any thing in this case to show that the terms of the hoondee have been departed from by the value of the hoondee being paid by the defendant to a person not answering the description of *shajoog* or respectable holder. On this head it is only necessary to state very shortly what the witnesses say. It may be taken on the evidence of the two last witnesses Hurgobind and Chundeemull called on behalf of the defence that Jaunkee Persaud was not seen by them before the occasion on which he came with the hoondee; but I do not think the evidence of Kaisree Chund on this point is false. Kaisree Chund says that he knew the firm of Urjoon Doss Hazareemull and that he knew that Jaunkee Persaud was their jemadar and had seen him before at the cootee of defendant of which he was the principal gomastah. He was pressed very hard to swear whether there was any entry in any of his books of a previous payment to Jaunkee Persaud, but he said that he had brought only the books for one year to Court and that he would not swear that there were entries in the books which were not in Court, as he could not remember, but he did swear that he knew Jaunkee Persaud and had seen him before at his the defendant's cootee. It may be that the defendant's firm had no business with Urjoon Doss Hazareemull and yet Jaunkee Persaud may have gone to the defendant's cootee with a friendly jemadar or done business for a friend of his and therefore it is not impossible that he was there before, and that Kaisree Chund saw him. I am not prepared to disbelieve the evidence of Kaisree Chund (who gave his evidence very fairly and did not press the matter too far) that he did know Jaunkee Persaud, and I am disposed to believe that he did know Jaunkee Persaud and that he knew him to be the jemadar of Urjoon Doss Hazareemull.

However I think this point immaterial in the present case. There is no doubt that a hoondee of this description passes from one holder to another according to the purport on the face of the hoondee; and therefore every person who has possession of a hoondee is at law *primâ facie* entitled to ask for payment of it, provided he answers the description of *shajoog*. Jaunkee Persaud did not ask for payment of this hoondee to him as Jaunkee Persaud but on behalf of and as representing Urjoon Doss Hazareemull whose name appeared on the hoondee itself. Coupling the fact

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that Jaunkee Persaud represented himself as the jemadar of Urjoon Doss Hazareemull with the fact that the hoondee bore the endorsement of the persons in whose favor it was accepted, namely, the endorsement of Urjoon Doss Hazareemull, and it being clear that the last mentioned endorsement has nothing suspicious about it, I say that the defendant's gomastah Kaisree Chund had every reason to believe that Jaunkee Persaud represented his principals Urjoon Doss Hazareemull who were undoubtedly *shajoog*. A contrary inference would give rise to the greatest confusion as every time a hoondee was presented by a jemadar (it being the invariable usage to present hoondees for acceptance, payment, or otherwise by jemadars) the person to whom a hoondee is presented would have to scrutinize the appearance of the jemadar and see if he was genteel looking or not, and if not, he would be forced to make enquiries. I think, for the purposes of business, it is only necessary to see whether the representations made by a person in possession of a hoondee, such as men would ordinarily believe, and if so the only essential enquiry is as regards the acceptance which was actually made in this case and was found satisfactory.

It appears to me that, if the hoondee had been presented without any endorsement, it might have been necessary to enquire whether the person in possession was a *shajoog*; but being presented by a man of the class of persons ordinarily entrusted with hoondees and bearing on the face of it an endorsement which appeared genuine, I do not consider any further enquiry or precaution was necessary as regards the holder then desirous of parting with it. The defendant's gomastah honestly believed the statement of Jaunkee Persaud and he found that statement confirmed by an endorsement which he could not have any reason whatever to suspect. Mr. Marindin however endeavours to put the case in the form of a dilemma; he says that if the hoondee passed by endorsement an enquiry need not be made, but the endorsement must be proved to be genuine, but if an endorsement was not necessary an enquiry was necessary. I do not think that is a correct contention. I think that a person is relieved from enquiring if he honestly believes the endorsement on the hoondee is the genuine endorsement of a *shajoog*, because then he believes that the same *shajoog* by putting his endorsement and placing the hoondee in the hands of a jemadar is desirous of parting with the hoondee, and consequently he is entitled to deal with a hoondee under these circumstances, and in doing so he only follows the ordinary course of business. If the above view is not correct, then I consider that when the endorsement of a transferer (although an endorsement on such a hoondee is not necessary) is genuine, that fact supplies the necessary enquiry; for it indicates that the holder on whose behalf the hoondee is accepted by putting his endorsement and placing it in the hands of a jemadar, desires to put the hoondee in circulation and to transfer it for value; and if this indication is the clear inference from these circumstances, I am at a loss to make out what enquiry a person discounting such a hoondee is bound to make. An enquiry under the circumstances assumed must necessarily result in the same information being obtained as the facts of a genuine endorsement and the handing over the hoondee to a jemadar for payment or discount would clearly indicate. In this view of the case, the dilemma suggested by Mr. Marindin is obviously avoided. If the present endorsement of Urjoon Doss Hazareemull is genuine, that circumstance places the title of the defendant to the hoondee beyond all doubt.

The question which I have next to consider is whether the endorsement of Urjoon Doss Hazareemull is genuine. As I have often said before, the presumption even in this country must be against fraud, and the smallest particle of reliable evidence which favors innocence and rebuts fraud if there is nothing to controvert it, should be carefully considered by a Court of Justice.

First then as to the direct evidence of the endorsement. The direct evidence is the evidence of three persons: the Bank of Bengal Moonshee, Sreeloll, and Gonesh Doss. The two last named I have no hesitation in characterizing as disreputable persons and I disbelieve their statements. I allude to Gonesh Doss and Sreeloll. The former evidently came to depose to the endorsement on the hoondee not being the signature of Mungul Chund, the gomastah in Calcutta of Urjoon Doss Hazareemull. In answers to the question whether the signature of the firm of Urjoon Doss Hazareemull on the endorsement of the hoondee was genuine or not; he at once said that it was not the writing of Mungul Chund. He denied before me that he had the smallest notion of what he was called to depose to in Court, but it appeared afterwards from his answer to questions suggested by Mr. Evans and put by

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the Court that a few days before he had been shewn this identical hoondee and had been questioned as to the signature on it of the name of Urjoon Doss Hazareemull. He was thus clearly guilty of deliberate falsehood in the course of his examination in Court. Apart from that, his means of knowledge were obviously worth nothing. Further he says he sat in one corner of the room and Mungul Chund sat in another corner of the same room, and at best he came into existence so far as this case is concerned after the goolmal or confusion had taken place, and Mungul Chund had lost his situation as gomastah of Urjoon Doss Hazareemull and at a time when Mungul Chund had no power to sign the name of that firm.

The other witness Sreeloll was very singular in his demeanour and conduct in the witness-box. He began several of his answers by saying that he arrived in Calcutta and joined the firm eleven months ago, and then went on giving his answer to questions wholly unconnected with the time of his coming down to Calcutta. He knew full well that he would be cross-examined and re-examined and was apparently anxious to remember the thread of his story, and consequently harped constantly on the subject of his arrival in Calcutta eleven months ago, and this is the witness whom Mr. Marindin wants me to believe. But to go further into his evidence, he says that he received letters from Mungul Chund and that he knows Mungul Chund's handwriting. Of course it may be that he received letters from Mungul Chund, though I do not think that that is likely. Even if he did receive letters from Mungul Chund, those letters would not contain the signature by Mungul Chund of the firm of Urjoon Doss Hazareemull. I think I may fairly dismiss from my mind this part of this witness's evidence. Then when he came down to Calcutta, he says he saw Mungul Chund write the name of the firm of Urjoon Doss Hazareemull, but on further examination he recedes from that statement and says he did not see Mungul Chund write the name of Urjoon Doss Hazareemull to hoondees, and that he was merely winding up the business of the old firm, and that he himself signed all hoondees. His evidence does not prove to my satisfaction that the signature of Urjoon Doss Hazareemull was not the handwriting of Mungul Chund. I consider the evidence of this witness as well as that of Gunesh Doss unreliable, and I believe their evidence to be tainted with falsehood in many respects. It is a matter for remark, having regard to the extensive business carried on by Urjoon Doss Hazareemull, that two such men as the two last witnesses should be produced to speak to their ordinary signature and that enquiries should not have been made in the bazar to find out respectable men who could speak to the signature of Urjoon Doss Hazareemull, and such men should not be tendered as witnesses. Knowing, as I do, the acuteness and ability which Mr. Paliologus, the attorney for the plaintiff, brings to bear in the management and conduct of his cases, can I believe that that enquiry in the bazar was not made? I should be very loath to believe that, and I adduce from the fact that no more respectable witnesses than these two men were called, that no such witnesses could be forthcoming. If the fact of the signature being a forgery was so clear as Sreeloll says it was, it would have been most easy to prove it by better evidence. The forgery of the signature of Urjoon Doss Hazareemull was opened by the Counsel for the plaintiff as a very strong point in the plaintiff's case. Proper and trustworthy evidence was naturally expected and should certainly have been adduced in support of it. There is an utter absence of satisfactory evidence on the point, and the result is that I do not think there has been any fraud so far as the signature of Urjoon Doss Hazareemull is concerned.

With regard to the evidence of Bussantlall, the Assistant Nagree Moonshee of the Bank of Bengal, who was called by the plaintiff and who says that in the course of his employment he had frequently seen the signature of Urjoon Doss Hazareemull, I do not think that the plaintiff can complain if I accept the testimony of this witness. He is apparently and undoubtedly a man of respectability, he clearly has some knowledge of what he deposes, he seems acute, and he says not once but repeatedly that the signature on the hoondee of Urjoon Doss Hazareemull is the genuine signature of that firm and that he would act upon it. Mr. Evans wanted to cross-examine this witness as to his knowledge of the signature, but Mr. Graham interposed, and I, out of mercy as it were to the hopeless and forlorn position in which the evidence of this witness had placed the plaintiff's case, asked him the questions Mr. Evans desired to put; and in reply to me the witness said that he would have passed the signature but that he would have done so on reference to the book of the Bank of Bengal

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which contained the signature of Urjoon Doss Hazareemull. This of course he would have done in the ordinary course of business. He further added that, without looking at the Bank Book, he believed the signature being the endorsement on the hoondee to be the genuine signature of Urjoon Doss Hazareemull. The presumption must be against fraud, and on the evidence of this man I am inclined to believe that the signature of Urjoon Doss Hazareemull on the hoondee is the genuine signature of that firm.

Next as to the indirect evidence, it appears to me probable that, whoever stole this note (and that it was stolen by some one is. I think, clear) before he altered it into the name of Urjoon Doss Hazareemull, could hardly have done it without the connivance of some one in the employment of Urjoon Doss Hazareemull, otherwise it is difficult to make out why the thief or his accomplice should select that firm out of all the other native firms in Calcutta. It is probable therefore that some one in the firm of Urjoon Doss Hazareemull lent his aid to this fraud. Now it is clear that at that time Mungul Chund was the only gomastah of Urjoon Doss Hazareemull in Calcutta, and therefore it is probable that Mungul Chund was the individual who assisted in the fraud. Now that probability is almost turned into certainty by the evidence in the case. The note was enclosed in a letter and probably despatched on the 24th of January. The goolmal or confusion took place a few days afterwards. On the 24th of February notice of the loss of the hoondee was given by the plaintiff's constituents in Calcutta to Koonjaloll Byjeenauth, the acceptors. About this very time Urjoon Doss Hazareemull's new gomastah Sreeloll comes down to Calcutta to split the old firm into two firms and get rid of Mungul Chund. Whether those two firms represent the old firm or not it is immaterial to enquire, though on the evidence of Gonesh Doss I may take it that the two firms are only so in name, they really constitute one firm. However that may be, the object of the severance is not disclosed to the outer world. It is not said that it was for the improvement or for the development or for the convenience of business; but it no doubt was due to some internal disorganization, and what is more likely than that internal disorganization was caused by the endorsement by Mungul Chund on this very hoondee of the name of the firm of which he had so long been the principal gomastah. It is clear that the goolmal occurred about the same time as the new gomastah came down, when it was deemed necessary to get rid of the man who must be presumed to have done some thing or other wrong and who was actually dismissed. The plaintiff's witnesses say Mungul Chund remained in Calcutta three months after the new firms started and did some business. But that was not the same business which he had done up to that time; and shortly after that he disappeared, and the evidence satisfies me he disappeared during the period which elapsed between the filing of the plaint in the suit in which the present defendant was plaintiff and the acceptors defendants, and the bringing of the suit which I am now trying. This suit was filed on the 2nd of June, and I believe the evidence of Kaisree Chund (though he does not appear quite certain of the date) that Mungul Chund went away shortly before that. I am inclined to believe that it was Mungul Chund's disappearance with all the books of Urjoon Doss Hazareemull which emboldened the present plaintiff to come forward with his suit. If Mungul Chund then was implicated, why should he not have put the signature to the hoondee? If Mungul Chund put this signature, the endorsement is the genuine endorsement of Urjoon Doss Hazareemull. Otherwise I must believe that third persons got hold of the hoondee, and with nothing to guide or aid them, changed the name of Ramloll Buddree Doss to that of some other firm at random. Mungul Chund was, I have not the slightest doubt, concerned in the changing of the names from Ramloll Buddree Doss to Urjoon Doss Hazareemull. Mungul Chund is not before me now, and therefore my present opinion will not bind him; but the evidence direct and indirect in this case leads me to believe that it was Mungul Chund who signed the name of the firm whose head gomastah he had been, and that he lent himself to the alteration of names in this hoondee. Therefore, looking at the direct and indirect evidence, I feel myself justified in holding that the endorsement on the hoondee is the genuine endorsement of Urjoon Doss Hazareemull.

There was a point made by Mr. Marindin which has raised the only doubt I have had in this case; it is as to whether this hoondee has a trust impressed on its very face. The plaintiff's constituent's gomastah Motee Ram, who gave his evidence in a very satisfactory manner, says that it is not the custom among respectable bankers to dis-

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count hoondees, as discounting would affect their credit in the market. But the question remains, what notice was given in this case? The hoondee must have been sent for one of two purposes, either to realize it and put it to the credit of the person who sent it, or realize it and put it to credit of the person to whom it was sent. Having regard to the fact that Urjoon Doss Hazareemull were respectable people, no enquiry was suggested by such a notice, and therefore, even admitting for the sake of argument that the hoondee passed by endorsement, I hold that no legal notice was communicated by the endorsement "sent for realization."

Moreover Kaisree Chund says he received this hoondee at night, that he did not see the endorsement which was written on the part rubbed out, and he merely looked to the face of the hoondee, so in point of fact he had no notice. As the hoondee passed by delivery, the suggested notice is no notice at all. In Raphael *vs.* the Bank of England* it was laid down that, if the Jury find that a person acted honestly notwithstanding he had the means of knowledge, that is sufficient. I believe that the defendants in this case did act honestly and paid full value for the hoondee.

Therefore, on the whole case, I am of opinion that the plaintiff is not the holder of the hoondee in law, and that he is not entitled to recover it from the defendant, and that the defendant is the *bonâ fide* holder for value without notice of the hoondee and in fact the owner thereof.

Throughout my judgment I have treated the case of the plaintiff that he lost the note in transit from Delhi and Calcutta as free from doubt, but it cannot, I think, be said that this part of the plaintiff's case has been proved beyond all suspicion. The letter containing the hoondee is said to have been posted in Delhi on the 24th of January. That letter in ordinary course would reach Calcutta on the 27th. It would be answered no doubt at once, and the reply would reach Delhi by the beginning of February. In fact, that no such answer was sent or received in this case would at once result in information being communicated to Ramloll Buddree Doss the latest on the 4th or 5th February; but this firm seems only to have received intelligence of the loss at or about the 12th February, on which day they gave notice of loss to the acceptors. The delay in the communication of the loss was most likely caused by the plaintiff's own gomastahs, and gives rise to a suspicion that they took part in matters connected with the loss of this hoondee. If that be so, the plaintiff cannot complain very much if he suffers from the misconduct of his own servants.

I have treated this hoondee as one which passed by delivery without endorsement. This view is supported by an unreported decision of Sir Barnes Peacock in the case of Goosaye Mull *vs.* Dhunsook Doss, to which I have been referred.† The soundness of this decision

* 17 C. B., 161.

† Published as follows in the Englishman of the 14th March 1871:—

The 15th May 1865.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman, *Judge*.

Dhunsook Doss *vs.* Goorsaye Mull.

THIS was an appeal from a decision of Mr. Justice Morgan, who had given a decree in favor of the plaintiffs to recover a hoondee or its value, of which hoondee they, as endorsees, sued the defendants in trover.

The facts of the case were as follow:—The plaintiff's firm of Dhunsook Doss Sewbux at Jeypore having purchased a hoondee for Rs 2,500, drawn by Gobind Doss Rughoonath Doss of Bombay on Luchmeechand Radhakissen of Calcutta, sent it unendorsed by them in a letter addressed to their Calcutta firm, Dhunsook Doss Mudden Gopaul. Neither this letter nor the hoondee reached Dhunsook Doss Mudden Gopaul, but subsequently the plaintiff's Jeypore firm received an attorney's letter written on behalf of the defendants, and giving notice of dishonour of the hoondee to the plaintiffs, who were therein stated to have endorsed the hoondee to Soorajvan Chundervan of Patna, by whom it is stated to have been endorsed to Dabeepersaud Kalkapersaud of Calcutta, who were represented to have endorsed it to the defendants, under their style of Tarachand Gunsam Doss. The plaintiffs denied all knowledge of the alleged endorsement by them to Soorajvan Chundervan, and, insisting that it was a forgery, brought the present action against the defendants to recover possession of the bill.

The defendants stated that the hoondee in question which was drawn payable to *shajoog*, or the repectable holder, was brought to them by a person on behalf of Dabeepersaud Kalkapersaud to be discounted, that it then purported to be duly accepted by the drawees in favor of Dabeepersaud Kalkapersaud, and specially endorsed by Dhunsook Doss Sewbux to Soorajvan Chundervan, and by them endorsed to Dabeepersaud Kalkapersaud. The defendants further stated that before discounting the hoondee, they had sent to the office of the drawees to enquire if it was all right, and being told that it was so, and that the acceptance in favor of Dabeepersaud Kalkapersaud was genuine, they gave full discount value for the hoondee. There was no evidence that the defendants at the time of discounting the note had any notice or knowledge that the endorsement of the plaintiff's firm was a forgery. The forgery was admitted, and the man who had made it had been convicted.

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is, as I understand from Mr. Marindin, admitted by him. I have merely considered the genuineness of the endorsement of Urjoon Doss Hazareemull as an element on the subject of enquiry which is supposed to be made with reference to a *shajoog*. I do not consider the endorsement of the hoondee in question necessary to pass the property in the hoondee; and I hold that, even if the endorsement be a forgery, that circumstance, according to the case last cited, and having reference to my own opinion that a hoondee of this description passes by delivery, would not detract from the title of the defendant. I further hold that with the endorsement on the hoondee which at least appeared genuine, and the representation of Jaunkee Persaud, the defendant had a right to be satisfied, and in due course of business he was under no obligation to make further enquiries.

The suit must be dismissed with costs No. 2.

The plaintiffs appealed from this judgment on the following grounds:—

First.—That the Judge, having found that the hoondee in the plaint mentioned had been stolen from the plaintiff, and that the insertion therein of the name of Urjoon Doss Hazareemull as the name of the person to whom the hoondee was sent by the plaintiff was a forgery, ought to have held that no property in the hoondee passed to the defendant by delivery.

Second.—That the Judge was in error in holding that property in a hoondee passed by delivery only.

Third.—That inasmuch as the hoondee bears on the face of it marks of forgery, the Judge ought to have held that the defendant took the same with notice that the same was not the property of Urjoon Doss Hazareemull.

Fourth.—That the defendant, assuming him to be a *bonâ fide* holder of the hoondee for value and without notice of fraud, by Hindoo law acquired no property in the hoondee as against the plaintiff.

Fifth.—That the Judge was in error in finding as a fact that the signature of Urjoon Doss Hazareemull upon the hoondee was genuine.

Mr. Bell and *Mr. Woodroffe* for the Appellants.

Mr. Eglinton and *Mr. Lowe* for the Respondents.

The Chief Justice.—It appears from the evidence that such a bill as this would, at any rate prior to acceptance, pass by delivery, and that the acceptor or drawer would not look to the genuineness of a note brought to him by a man of known respectability. Then it appears to have been the custom in such a note as this to make it in favor of the acceptor. In this case a large and respectable banking house accepts this note, payable to Dabeepersaud and Kalkapersaud. That note would have been very easily and very readily negotiated in the market for full value. Therefore, there was no necessity for Dabeepersaud, if he had stolen this note, to have gone to any secret place and sold it for a small consideration. He takes it to defendants. There does not appear to be any proof that they dealt with the note otherwise than in any ordinary way of their business. The consideration which they gave for this and other notes was 1,200 sovereigns. They made a written entry of this transaction in their books, as was proved by their gomastah. The learned Judge does not doubt that the defendants gave the 1,200 sovereigns for the notes: and if they did, I am at a loss to see what could prevent them from being considered *bonâ fide* holders. If the learned Judge had said that they had given very small value, that would have been a reason for his thinking that they were not *bonâ fide* holders, or that they had given too small consideration. The first part of his judgment seems to imply, but I do not see in the evidence anything to show, that they had given less than the full value, because the entry shows that they had got 8 per cent. discount and nine pie, about Rs. 67 or 70 profit.

In another part of his judgment the learned Judge says:—"The case seems to me that at the time when the hoondee reached the defendants, the instrument did not pass by delivery from hand to hand as bank-notes, &c., but by endorsement: no one could make a title to it if they were forgeries. Defendants, though they were the holders and had paid money for it, failed to acquire any property." The learned Judge seems to have thought that they were the holders of the note, and had paid the value of the note, but that they were not *bonâ fide* holders. It appears to me that, when they paid the sovereigns, they were holders for value, and there is nothing in the evidence to induce me to think that they are not holders for value, and, therefore, holders for valuable consideration. Consequently, they are the owners of the note, and the plaintiff cannot recover it from them, although he might have done so if they had been holders without full value or after notice of forgery.

Mr. Justice Norman.—I am entirely of the same opinion. It seems to me clear that when the defendants took this note, they had not notice that it was a stolen one, at least we can come to no other conclusion upon the evidence. In the first place, I do not see by what means they could have got information. There was not a particle of evidence that the plaintiff sent information to the acceptors that the hoondee had been stolen, and therefore the natural inference is that the defendants gave, as they said they did, full value for it.

I think, therefore, that it is clear that the acceptors of this note, who had accepted in favor of Dabeepersaud, were respectable bankers, and that there was no necessity, therefore, for Dabeepersaud going and dealing with this note for less than the full value.

Under these circumstances, the plaintiff is not entitled to recover the value.

The decree of the Lower Court will be reversed, and a decree given for the defendants with costs, to be taxed according to scale No. 2, costs of appeal to be taxed on the same scale.

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Sixth.—That the Judge ought to have held that the defendant received the hoondee from a person who was not a respectable holder thereof and without due enquiry, and that the defendant therefore acquired no property therein as against the plaintiff.

Seventh.—That inasmuch as the hoondee appears on the face of it to have been sent for realization, the defendant acquired no property therein as against the plaintiff by discounting the same.

Eighth.—That it appears in evidence that it is contrary to the custom prevailing among merchants in India to discount hoondees sent to them by their constituents for realization.

Ninth.—That the Judge ought to have held that the plaintiff was in law the holder of the hoondee and entitled to recover the same from the defendant.

Marindin for the appellant argued that the onus of proving that the said endorsement was a forgery had been thrown on the plaintiff. It lay on the other side to show that the signature of Urjoon Doss Hazareemull was really the signature of that firm. He has not done that. He cited 1 Colebrooke's Digest, Ch. 2, Sec. 1, Texts 25-36; Fearn and Fillica, 7 Man. and Gr., 513; Montriou's Hindoo Law, Stokes, 169-170; Sigourney *vs.* Lloyd, 8 B. and C., 622; same case in 5 Bing. 525; Murrow *vs.* Stuart, 8 Moore's P. C. Ca., 267.

Evans on same side cited Rajroopram *vs.* Buddoo, 1 Hyde, 155; Byles on Bills, page 2, note *e*—and pages 314 and 323; Sumbhoonauth Ghose *vs.* Judonath Chatterjee, 2 Hyde, 259; Umritram *vs.* Damooder Dass, Boulnois, 589.

The *Advocate-General* and *Lowe* for the respondent cited Byles on Bills, last Edition, 163; and Coles *vs.* Bank of England, 4 Jurist, old series, 266.

The judgment of the Appellate Bench was delivered as follows by:—

Phear, J.—The plaintiff in this action seeks to recover from the defendant a certain hoondee or its value. The history of this hoondee may be given as follows:—It was drawn at Bhowanee by Chuttoorbooj Moorleedhur upon the firm of Koonjaloll Byjeenauth at Calcutta. It recited that Rs. 2,300 had been deposited with the drawer by Dabeeram Ameechund as consideration for the hoondee on the 1st *Maugbuddee*; and it directed the drawer to pay that sum in current rupees to the *shajoog* sixty-one days after that date.

This hoondee was purchased from Dabeeram Ameechund by the plaintiff, and an endorsement (so to speak) having been written on the face of it in these words, "Hoondee sold by Dabeeram Ameechund to Bhaee Muthwulla Mull Thakoor Doss, sent by Muthwulla Mull Thakoor Doss to Bhaee Ramloll Buddree Doss for realization," it was in this condition posted by the plaintiff at Delhi on 8th *Maugbuddee* under an address to Ramloll Buddree Doss at Calcutta.

The hoondee never reached Ramloll Buddree Doss, and was probably stolen on its way to this firm, although there is no evidence in the case to show by whom it was, or how it came to be, stolen.

On the 12th *Maugbuddee*, however, it was presented by some person to Koonjaloll Byjeenauth for acceptance

At that time, it appears, the endorsement which I have spoken of, was not in its original form, but had been altered by the erasure of the name "Ramloll Buddree Doss," and the substitution of "Urjoon Doss Hazareemull" in its place. Under this endorsement, so altered, there is now the name "Urjoon Doss Hazareemull" written in the manner of a signature. I cannot clearly make out from the evidence and the judgment of the Lower Court whether or not this signature was there at the time when the hoondee was presented to Koonjaloll Byjeenauth. I imagine that it must have been so, although in the view of the case which I have taken, the fact is not of any great importance.

Upon the hoondee being presented to Koonjaloll Byjeenauth in the way I have mentioned, they wrote their acceptance on the back of it in the following words:—"Accepted by Koonjaloll Byjeenauth to Urjoon Doss Hazareemull."

On the evening of the day on which the hoondee was accepted, and after it had been accepted, namely, at 10 P. M. of the 12th *Maughbuddee*, the hoondee was brought to the defendant by one Jaunkee Persaud, a jemadar, to be discounted. The words of the defendant's gomastah Kaisree Chund himself on this point are:—

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"The hoondee was accepted when it was brought to me. I made Jaunkee Persaud sit down there, and sent Hurogobind jemadar to Koonjaloll Byjeenauth to enquire whether they had accepted the hoondee or not. I gave Hurogobind jemadar the hoondee. He went with the hoondee and came back with a satisfactory reply. After I was satisfied with the answer, I paid the money to Jaunkee Persaud. The discount was 7½ per cent. That was the discount of that time. I gave him the full amount after deducting at the rate of 7½ per cent."

Afterwards Kaisree Chund said, "A letter had come to me about the hoondee, and Jaunkee brought the hoondee to me at night. Ramkissen was the Lalla. I knew him five or six months previously. I had transactions through him before that."

It does not appear from the deposition of defendant's gomastah, Kaisree Chund, which is on the record, that he saw the hoondee, when brought to him, bore the name of Urjoon Doss Hazareemull written as an endorsement beneath the acceptance, but it is there now, and it seems to have been assumed throughout the trial that the defendant took the hoondee under that endorsement. The judgment of the lower Court turns entirely upon the finding of fact come to by the learned Judge, to the effect that this is a genuine signature of the firm of Urjoon Doss Hazareemull put on the hoondee after it had been accepted for the purpose of passing it to the defendant. I will therefore assume that the endorsement which follows on the acceptance was on the hoondee when the defendant discounted it. I cannot, however, go so far as to agree with the learned Judge in thinking that it is the genuine signature of Urjoon Doss Hazareemull. The lower Court found (and in this it appears to have been indisputably right) that the substitution of "Urjoon Doss Hazareemull" for "Ramloll Buddree Doss" was not made by or under the authority of Muthwulla Mull Thakoor Doss, and was an unquestionable forgery. This fact of itself seems to me to render it peculiarly unsafe to pass to the conclusion that the subsequent endorsement "Urjoon Doss Hazareemull" is genuine, except upon very clear evidence; and certainly the evidence bearing upon this point is, to say the least of it, exceedingly meagre and frail. Under the circumstances of the case, the genuineness of this endorsement involves something more than the mere writing of the name; for the firm must have treated the previous forged endorsement to themselves as a real endorsement, have procured the acceptance in their favor, and then endorsed the hoondee to the defendants. Again, all this must have been done by Urjoon Doss Hazareemull either with full knowledge of the forgery, or as the consequence of an imposition practised upon themselves. But the latter alternative is out of the question, because the defendant in his written statement says that his gomastah, upon hearing a report to the effect that the hoondee in dispute was a stolen hoondee, sent to Mungul Chund, the head gomastah and manager of Urjoon Doss Hazareemull's firm in Calcutta, to ask about the hoondee, and Mungul Chund in answer said that he knew nothing about it. If therefore, notwithstanding this denial, Mungul Chand or any other person having authority to bind the firm had, in fact, written the endorsement on behalf of the firm, it is manifest that this act must have been done in fraud. Now it appears to me that the only evidence in the whole case which tends in any degree to bring the endorsement home to the firm of Urjoon Doss Hazareemull is the statement of Kaisree Chund, the defendant's gomastah, to the effect that he knew Jaunkee Persaud who brought him the hoondee, to be a jemadar or other servant of Urjoon Doss Hazareemull, coupled with the testimony of Bussuntloll, Nagree moonshee of the Bank of Bengal, a witness called by the plaintiff, who, on looking at the endorsement, said, "I say it is the endorsement of Urjoon Doss Hazareemull." But both Kaisree Chund and Bussuntloll afterwards qualified their first statements very much. Kaisree Chund gave a very lame explanation as to how it happened that he knew Jaunkee to be the servant of Urjoon Doss Hazareemull, and Bussunt admitted that his duty at the Bank was merely to pass signatures by reference to the entries in a signature book; he could say nothing as to the authenticity of the signature in that book, and had no opportunity of learning how often, if at all, he had committed error in passing signatures by the book. Independently of this book, he had no knowledge whatever of the signature of the firm of Urjoon Doss Hazareemull. Obviously, then, this witness's identification of the endorsement with Urjoon Doss Hazareemull's signature was nothing more than a

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mental comparison with the writing in a book which was not at the time under his eyes. It was not of any higher order of value as evidence than the book itself; but the defendant's Counsel successfully objected to the production of the books, on the ground that that was not legal evidence. I must say that evidence of this sort, even if there were nothing in the case to counteract it, would fall short of satisfying me that the firm of Urjoon Doss Hazareemull in Calcutta committed the gross fraud of which, in effect, the learned Judge has found them guilty in the person of their manager, Mungul Chund. It is true that the learned Judge appears to think that certain changes which took place in the firm of Urjoon Doss Hazareemull shortly after the time when this hoondee was discounted, reasonably give ground for imputing some unknown dishonesty of conduct to Mungul Chund; and that, inasmuch as he went to Bikaneer after having been subpœnaed as a witness in this case, and has not appeared in Court, the proper inference is that his dishonesty was connected with the subject-matter of this suit. It appears to me that this course of argument, so far as I apprehend it, is dangerously speculative, and ought not to be considered as furnishing the slightest additional force to the evidence of which I have already spoken. On the other hand, the non-production of either the broker or of Jaunkee Persaud, the entire absence of any evidence to connect these persons with the firm of Urjoon Doss Hazareemull, the admission of the defendant's own servants reluctantly made, that they had never before the night in question seen Jaunkee Persaud, and the now undisputed fact that the endorsement to Urjoon Doss Hazareemull was a forgery, altogether seem to me to weigh very heavily against the hypothesis that the endorsement of the name of Urjoon Doss Hazareemull was the real act of that firm. In short, with the greatest deference for the opinion of the learned Judge who tried the case in the Court below, I feel bound to hold that the endorsement which follows the acceptance is just as unreal as the endorsement to Urjoon Doss Hazareemull which immediately precedes it, and almost necessarily I come to the same conclusion with regard to the signature Urjoon Doss Hazareemull which is appended to this last-mentioned endorsement.

In this state of the facts I think the plaintiff's right to recover against the defendant is clear. The hoondee was his property, and he never voluntarily parted with it. His right of property in it, and to the benefit of the contract embodied in it, must be upheld, unless the mode and manner in which the defendant became possessed of it sufficed in law to give him (the defendant) a title to it, even as against the real owner. Now the strongest way in which the defendant's case as to this point can be stated is that he purchased the hoondee for valuable consideration without notice of the vendor's want of title, and no doubt, according to English mercantile law, the property in a negotiable instrument payable to bearer passes to a *bonâ fide* purchaser for value without notice, even though the vendor had no title; just as is the case with the sale of goods in market overt under similar circumstances. But I need hardly say that this law of the market overt, which gives the power of sale to a non-owner out of regard for the circumstances of the innocent purchaser, is founded upon very special principles of expediency, and among Hindoos it appears to take a very peculiar shape. See Menu, Ch. VIII., 201, 202; Colebrooke's Dig. Bk. 2, Ch. II., Sec. 2; and Sir. H. L., Ch. XII., d. 3. How far there may be a law of this nature operative between Hindoos in regard to such a subject as an unendorsed hoondee payable to the "*shajoog*," I will not now stay to enquire; for the hoondee which is before us was specially endorsed by the plaintiff when it left his hands, and it was afterwards also specially accepted by Koonjaloll Byjeenauth. The question which claims our attention is whether or not the defendant, by reason of having purchased the hoondee for valuable consideration without notice, obtained a good title to it, notwithstanding the forged special endorsement *before* acceptance, and the forged endorsement to himself *after* the special acceptance. If the analogy of English law applied here, of course the answer would be in the negative. It is said, however, that the Hindoo law in this matter is widely different from the English, and that a hoondee purporting to be payable to the "*shajoog*," whatever may be the form of the endorsement it bears, passes by delivery to a purchaser for value who has no notice of the vendor's want of title. At the outset, I must say that this appears to be a remarkable proposition. "Joog," we are told, is nothing more than our word "payee," the person who has the right to be paid; and "shah" means

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respectable or honest. Then who answers to the term "*shajoog*," unless it be the person designated by real (not fictitious) endorsements? The authority put forward in support of this contention is a decision of an appeal bench in the case of Goorsayemull *vs.* Dhunsook Doss, reported in the *Englishman* newspaper of the 14th March last. According to that report, the Court certainly does seem to have stated, as its opinion, that before acceptance at any rate, a hoondee payable to "shajoog" would pass by delivery merely, without regard to the authenticity or otherwise of any special endorsement which might be upon it. It is not clear how this expression of opinion was pertinent to the case before the Court, because, as far as I can learn, the facts of that case did not exhibit any *bonâ fide* taker of the hoondee before acceptance, and I suppose the Court never meant to lay down that under Hindoo law every one who took the hoondee, even though he obtained it by fraud, would be treated as a *shajoog*. The facts of that case, upon which the decision of the Court was really founded, seem to have been simply these:—One Dabeepersaud, having dishonestly obtained possession of a hoondee before acceptance, forged a special endorsement to himself, got it accepted in favor of himself, and then endorsed it to the defendant. The substance of the Court's decision was that it would not look behind the acceptance; and treating the acceptance as the foundation of the defendant's right, his title from that point was impeachable. In the view of the facts of the present case, at which I have arrived, this decision, so understood as I have just explained it, does not apply, for Koonjaloll Byjeenauth accepted the hoondee in favor of Urjoon Doss Hazaree Mull, and Urjoon Doss Hazaree Mull did not endorse it to the defendant. I will not therefore further discuss the merits of the case of Goorsayemull *vs* Dhunsook Doss.

Returning then to the case before us, it seems to me that, in considering the right to a hoondee, we are as much bound to put a reasonable construction upon the words of an endorsement or an acceptance as upon any other part of the document; and when a Hindoo maker or rightful owner of a hoondee payable in terms to the *shajoog*, endorses it as sold or sent to A, he obviously means to pass the right of dealing with the hoondee to A alone. It may well be that, according to Hindoo customary law, A can transfer his right to a third person (B) by word of mouth or mere delivery, notwithstanding that the special endorsement to himself is in writing; but there is no evidence before us to suggest that, after the special endorsement to A, the hoondee can be validly transferred to B otherwise than by A or by A's authority. It seems to be only common sense that the term "*shajoog*" should be subordinate to the directions of the successive owners, and should mean "the right men to be paid," according to the tenor of the document, which must include both the endorsement and acceptance. I certainly am not aware of any rule of Hindoo law, customary or otherwise, which would have the effect of making the word "*shajoog*" mean payable to *bearer*, quite independently of the endorsements. If there were such a rule in practice, endorsements would be useless, and would, I suppose, very soon be dropped altogether. Also, I know of no principle of mercantile expediency, having the force of law or otherwise, which would be served by our disregarding the direction of the endorser, and treating a specially-endorsed and specially-accepted hoondee as if it were an English negotiable instrument made payable to bearer, and as such, part of the currency of the country. On the contrary, as it appears to me, expediency is all the other way.

I thus come to the opinion that the defendant has failed to rebut the *primâ facie* title of the plaintiff by making out any title in himself; he gets none on the document itself from the undertaking of the acceptor, for the reason that I have before mentioned, and he gets none traceable to the special endorsement of the plaintiff, because the line of title is broken by two forgeries. He probably has a right as against Koonjaloll Byjeenauth to be paid the hoondee on the ground of estoppel; but this cannot affect the plaintiff's claim.

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The 25th July 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Jurisdiction—Cause of action—Carrying on business—Working for gain—Clause 12, Letters Patent—Hoondee—Accommodation Bill—Principal and Surety—Time given to Principal—Notice.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Hurjeebun Doss (Plaintiff) *Appellant*,

versus

Bhugwan Doss (Defendant) *Respondent*.

Messrs. Lowe and *Bonerjee*, for the Appellant.

Messrs. Marindin and *Evans* for the Respondent.

Per PHEAR, J.—The *cause of action*, within the meaning of clause 12 of the Letters Patent of 1865, is not merely the right of the plaintiff, and the infraction of it by the defendant, but also includes the facts out of which the plaintiff's right arises.

Defendant was in the habit, several times in the year, of buying country-produce at Patna, where he principally resided, bringing it down to Calcutta for sale, selling it in Calcutta, and returning with the proceeds to Patna. He was also in the habit of drawing bills at Patna on himself at Calcutta, and of paying them there, as well as of dealing in hoondees drawn by himself at Patna on himself at Calcutta, and usually paying them at Calcutta out of moneys realized by the sale of his goods at Calcutta. During one of his visits to Calcutta as aforesaid, the present suit was instituted. HELD by the Appellate Court (reversing the decision of the Court below), that the defendant, at the time of the commencement of the suit, did *carry on business* or *work for gain* within the local jurisdiction of the High Court, within the meaning of the same clause.

Plaintiff sought to recover the amount of a hoondee drawn by defendant at Patna on defendant at Calcutta, payable, 41 days after date, to S. A. or order. The defence was that the hoondee was an accommodation bill given by defendant to S. A. for his accommodation, and without consideration; and that plaintiff, after the hoondee had become due, and after plaintiff had notice that defendant was, with regard to this hoondee, only surety for S. A., the principal debtor, gave time to the principal S. A., so as to release defendant, his surety. HELD, that the effect of the new arrangement was not to alter the position of the parties (*i. e.* converting S. A. into principal and defendant into surety) so as to release defendant from his original obligation as principal debtor.

The plaintiffs sued the defendant on the allegation that the defendant's firm at Patna, on the 15th day of the light side of the moon in Bhadro 1924, corresponding with the 13th of September 1867, by his hoondee or bill of exchange which was overdue at the time of the institution of the suit, directed to the defendant's firm at Calcutta, required the defendant's firm at Calcutta to pay Sheikh Syed Ally Sahib or order the sum of Rs. 2,500, forty-one days after date, and after the defendant's firm at Calcutta had accepted the said hoondee in Calcutta, Sheikh Syed Ally Sahib endorsed it over to the plaintiffs, but the defendant did not pay the amount thereof. The plaintiffs accordingly sought to recover the said sum of Rs. 2,500 from the defendant with interest.

The facts on which the plaintiff relied were as follows:—

They alleged that one Sheikh Syed Ally lately carried on business as merchant at Calcutta and Patna. The plaintiff's firm had several transactions with the said Sheikh Syed Ally through one Beharee Loll, the head gomastah and agent of Sheikh Syed Ally in Calcutta, and in the course of such transactions the plaintiff's firm used to discount hoondees drawn by or in favor of Sheikh Syed Ally at the current rates of discount. The universal practice of up-country merchants settled in Calcutta, the plaintiffs averred, was to discount hoondees and transact other hoondee business after nightfall and to pay money on the hoondees in the case of approved customers without any enquiry at the time of such payment, the enquiry being made the next day or as soon thereafter as convenient. On the 14th of September 1871, one Nearmull Chowdhry, a broker employed on behalf of Sheikh Syed Ally, called at the plaintiff's place of business at nightfall, and requested the plaintiff Hurjeebun Doss to discount the hoondee which forms the subject-matter of this suit, and Hurjeebun Doss agreed to do so at a discount of one rupee per cent. per mensem. The hoondee was afterwards brought to Hurjeebun Doss by one Muckhunloll Chowbay, a collecting Sircar then in the employ of Sheikh Syed Ally; and the plaintiff Hurjeebun Doss having no reason to suspect that it was other than a genuine document, and without any notice to that effect, discounted the same and paid Muckhunloll Chowbay the sum of Rs. 2,467-8-5. On the following day, the plaintiffs, according to the practice aforesaid, sent their Durwan, one Moonsingh, since deceased, to the defendant's place of business to ascertain, as a matter of form, whether the hoondee in question had been drawn by the defendant

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and bore his acceptance, and were informed after due enquiries that the hoondee was in all respects genuine. Shortly before the hoondee became due, Sheikh Syed Ally suspended payment, and subsequently removed his business from Calcutta. Soon after Sheikh Syed Ally's failure, the plaintiff Hurjeebun Doss called at the defendant's place of business in Calcutta and saw the defendant Bhugwan Doss and asked him whether it would be convenient for him to take up the hoondee, Hurjeebun Doss offering to pay the discount. The defendant thereupon saw the hoondee and informed Hurjeebun Doss that he had never accepted the hoondee. Hurjeebun Doss explained the circumstances under which the plaintiffs had become the holders for value of the said hoondee, but although the defendant did not deny the drawing of the hoondee by his firm at Patna, he refused to take it up as requested by the plaintiff Hurjeebun Doss. When the hoondee became due it was presented to the defendant for payment by the plaintiffs, through their attorney, but the defendant refused to pay the amount due thereon. Before bringing this suit. the plaintiff applied to Sheikh Syed Ally for payment of the hoondee, and he agreed to do so by instalments; but he did not pay the amount due on the hoondee or any part thereof, and on the 21st of November 1870 the plaintiffs obtained a decree from this Court against him for the sum of Rs. 2,800 including the sum of Rs 2,500 due on the hoondee, but no portion of the said sum has been recovered by the plaintiffs.

The defendant in his answer stated that he carries on business as a trader at Patna. and does not reside nor carry on any trade or business nor personally work for gain in Calcutta, nor did the alleged cause of action arise in Calcutta, and he is therefore not subject to the jurisdiction of the High Court. He then went on to aver that on the 15th day of the light side of the moon in the month of Bhadro in the Sumbut year 1924, corresponding with the 13th of September 1867, Sheikh Syed Ally of Patna requested him at Patna to draw a hoondee on the defendant in favor of Sheikh Syed Ally for Rs.2.500 payable at Calcutta forty-one days after date; and the defendant accordingly did so, but no consideration was paid for the hoondee, Sheikh Syed Ally having promised to pay such consideration in the course of a day or two. Sheikh Syed Ally failed to pay the amount of the hoondee, and informed the defendant that the amount of the hoondee would be paid at Calcutta by his gomastah, and he accordingly wrote and delivered to the defendant a letter addressed to his firm at Calcutta as follows :—

"This auspicious letter is written to the most worshipful Bhaee Sheikh Syed Ally Sahib whose salutations you will accept. Further I sent you a chittee (hoondee) for Rs. 2,500 drawn by Bhugwan Doss upon Bhugwan Doss (upon us) Calcutta, value deposited by me on the 15th day of the light side of the moon in Bhadro, payable forty-one days after date in Company's rupees.

I have taken a hoondee of this description which you will pay on its due date, the money has not been paid for which I give this poorjah in writing which you will know.

Further all well. Date Monday, the 3rd day of the dark side of the moon in Assin Sumbut year 1924."

The defendant on receipt of the said letter immediately came down to Calcutta, and called on the gomastah at Calcutta of Sheikh Syed Ally who stated that he would meet the hoondee on the due date and take back the letter from the defendant, but Sheikh Syed Ally failed to pay the hoondee on the due date.

The defendant then went on to deny that the hoondee was ever signed by him as accepted, but averred that the signature Bhugwan Doss, which appeared on the hoondee as his, was forged and spurious. He said he informed the plaintiffs that such signature was forged and spurious, and that the consideration money thereof had not been paid by Sheikh Syed Ally, and also that Sheikh Syed Ally, the payee thereof, had obtained the same under false promises of payment, and the plaintiffs should look to Sheikh Syed Ally for the amount of the hoondees.

The defendant then alleged that shortly after the date on which the hoondee became due, the plaintiffs realized from Sheikh Syed Ally at Patna the sum of Rs. 2,200 in part payment and satisfaction of the hoondee, and another hoondee for Rs. 2,500 drawn by Ramjesharam Sahoy, and also discounted by the plaintiffs; and that on the 7th day of the light side of the moon in the month of Kartick 1924, the plaintiffs negotiated and agreed to receive Rs. 2,800 the balance due on the said two hoondees, by four instalments, and he further charged that Sheikh Syed Ally had, since the date of the said arrangement, paid the sum of Rs. 360 in further payment and satisfaction

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of the said hoondees. He accordingly submitted that under these circumstances the suit should be dismissed with costs.

The hoondee was in the following form :—

Chitty sent by Shaik Syed Ally Sahib to Bhaee Shaik Syed Ally Sahib.

This auspicious letter is written to the worthy of all comparison Bhaee Bhugwan Doss who is in Calcutta, the auspicious place of success, from Patna, by Bhugwan Doss, whose salutations you will accept. Further I draw on you a Chitty (hoondee) for Rs. 2,500 (in letters two thousand five hundred,) the half of which is twelve hundred and fifty, you will pay the full double (of the latter sum) here deposited by Sheikh Syed Ally Sahib, on the 15th day of the light side of the moon in Bhadro, payable forty-one days after that date to the order of the Dhunnee (principal) in Company's rupees, after ascertaining and adopting precautionary measures in respect of the chitty you will pay the value. Further it is welfare. Date the 15th day of the light side of moon in Bhadro, Sumbut 1924.

Signature of Bhugwan Dass.

Chitty accepted by Bhugwan Doss in favor of Shaikh Syed Ally Sahib.

(On the back)

Sheikh Syed Ally Sahib.

This auspicious letter addressed to Bhaee Bhugwan Doss at Patooriaghatta in Calcutta.

The judgment of Phear, J., in this case was as follows :—

In the plaint it is alleged that "the defendant's firm at Patna, on the fifteenth day of the light side of the moon in Bhadro in the Sumbut year 1924, corresponding with the 13th day of September 1867, by his hoondee or bill of exchange now overdue, directed to the defendant's firm at Calcutta, required the defendant's said firm at Calcutta to pay to Sheikh Syed Ally Sahib or order the sum of 2,500 Rs., forty-one days after date, and the defendant's said firm at Calcutta, as the plaintiffs verily believe, accepted the said hoondee or bill of exchange in Calcutta, and the said Sheikh Syed Ally Sahib endorsed the same to the plaintiffs, but the defendant did not pay the said sum of 2,500 Rs.;" and upon this footing the plaintiffs seek in this Court to recover from the defendant the sum of 2,500 Rs. with interest.

It is somewhat strange that although the plaint affects the exact formality of English pleading, no mention is made in it of presentment for payment having occurred according to the terms of the hoondee sued upon. However, no objection was made to the plaint on this ground, and the matter thus omitted was supplied by the plaintiffs' written statement; I may remark that the plaint is very bald in other respects.

The defendant admits that he drew the hoondee as alleged.

The document runs in these terms (see *ante.*)

The defendant however denies that he ever accepted the hoondee as alleged, and he says that the endorsement which now appears upon it in these words, "Chitty accepted by Bhugwan Doss in favor of Sheikh Syed Ally Sahib," is not in his handwriting and was not made with his authority. I think I must take his testimony on this point to be true. According to the plaintiff's account the hoondee was brought to him in Calcutta, and he discounted it on the evening following the day when it was drawn by the defendant at Patna, and the plaintiff states positively that at that time the hoondee bore the endorsement which purports to be the acceptance of the defendant. Now it is beyond dispute that the defendant had no gomastah or agent of any sort in Calcutta, and it is not suggested that he accepted the hoondee at Patna simultaneously with drawing it. The only possible alternative in favor of the acceptance being genuine therefore seems to be that the defendant came to Calcutta by the train which brought the hoondee, and so was in Calcutta in time to receive the presentment of the hoondee and to accept it before it was taken to the plaintiffs to be discounted. But I think it is clear on all the evidence that this was not the case. The defendant did not come up to Calcutta for some days at least after making the hoondee. And indeed it is evident from the document itself

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coupled with the nature of the defendant's business, that acceptance, in the technical sense, was not necessary to the force of the document, and probably was not contemplated at first by any one. The defendant had no *cooty* or establishment of any sort in Calcutta, excepting when he himself came there with his goods and remained to sell them. And even then he took up his quarters sometimes at one person's *arhut*, sometimes at another's. The hoondee was in effect a simple promise on the part of the drawer that he himself would pay the money at Calcutta forty-one days after the date of drawing. It was not an undertaking by him that some one else would accept on presentment and pay at the expiration of some subsequent period.

In this view of the principal facts, inasmuch as the plaint was filed without special leave previously obtained in pursuance of the provisions of Clause 12 of the Letters Patent of our Court, the question at once arises, did the plaintiff's cause of action arise wholly within the jurisdiction of this Court?

In the case of DeSouza *vs.* Coles (reported 3 Mad. H. C. R., 384) two very learned and able Judges of the Madras High Court discussed at great length the meaning of the words "cause of action" as used in that Clause of the Madras High Court Letters Patent which corresponds with our 12th Clause; and although they were not able to arrive at unanimity of opinion with regard to the meaning, they have, in their respective judgments, dealt exhaustively with the materials upon which the question depends.

The remarkable power of research and the great erudition of Mr. Holloway necessarily have the effect of investing his opinion with peculiar importance, and I feel the difficulty of justifying my dissent from it. He was led to the conclusion that a truly scientific conception of the term "cause of action" embraces nothing more than the right resident in the plaintiff and the infraction of it by the defendant. And no doubt a definition in some such words as these may be resorted to with much advantage, if our only purpose is to obtain a precise technical term for use in processes of scientific enquiry. Probably the Jurists and Commentators, to whom Mr. Holloway refers for authority, pretty well agree in the adoption of a definition of this narrow and exact character. But it seems to me that, even if this be the fact, it helps us extremely little, for our immediate object is to discover not the sense which the words "cause of action" ought to be understood to convey when employed with close attention to the accuracy of a scientific phraseology, but the sense which they ordinarily bear in the language of English Lawyers, due regard being had to their connection with the rest of the Clause wherein they appear. What do the words mean in this particular situation, is the question for our consideration; and I am afraid that principles derivable even from so great a jurist as Doneau are scarcely calculated to afford us much in the shape of guidance.

The first thing that occurs to us, upon looking into Clause 12, is that the authors of the Letters Patent understood by "cause of action" something which might consist of parts respectively attributable to different local origins. A part of the cause of action might arise within the local limits of the Court's jurisdiction, while another part might arise beyond those limits. But, unless I greatly misunderstand Mr. Holloway's meaning, "cause of action," under the definition which he accepts, is necessarily indivisible; the obligation of the defendant towards the plaintiff, which is, I may say, the correlative of the plaintiff's right in the matter of any given suit, must, I conceive, if attributable to place at all, be almost universally single, or capable of being treated as single, in regard to locality. And the breach of the obligation does not introduce any new element of locality. It appears to me, therefore, for this reason alone, that the right and the infraction of it do not together make up the full measure of "cause of action" in Clause 12.

But however this may be, it seems to me clear upon all the decisions reviewed in DeSouza *vs.* Coles that the English Courts have always included in the "cause of action" some portion at least of the ground of origin of the right. The inconsistencies of decision of which Mr. Holloway complains do not appear to me to exhibit an oscillation between an including of the "ground of origin of the right" on the one side and an excluding of it on the other, but rather manifest themselves in the differing quantities of that ground which it was thought necessary in the various cases to take in. For instance, in causes of action arising out of contract, sometimes the *factum* of the contract is, for the purpose of determining the forum, held to be an essential part of the cause of action, and sometimes not. Thus, no doubt, the decision of the Privy Council, in Luchmeechund *vs.* Zorawur

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Mull (reported 8 Moore, p. 291),* excluded the contract of partnership, which was the first of the series of facts leading up to the plaintiff's right. But the decision did not, as I read it, therefore exclude every thing excepting the locality of the plaintiff's rights. On the contrary, the Privy Council not only did not, as it seems to me, set itself to enquire whether there was any place to which the plaintiff's right was specially attributable, but it distinctly founded its judgment upon a consideration of the place of those facts, which immediately gave rise to that right. And it appears to me that we here meet with the one principle which underlies and explains all the decisions of the English Courts and accounts for their inconsistencies. Indeed it would have been reason for great surprise if Lord Chelmsford, the spokesman of the Privy Council on this occasion, had been found giving utterance to doctrines more scientific than those which commonly prevail in Westminster Hall. I venture to think that in all cases the English Courts have held that the cause of action is only complete when the facts out of which the plaintiff's right immediately arose are comprehended in it is as well as the facts which constitute its infraction. The diversities of decision are, I think, all referable to the practical difficulty, which so often presents itself, of determining what is the immediate proximate cause of the plaintiff's right as distinguished from that which is prior and more remote. And it should be remembered that many decisions, such as the late decision in the case of Jackson *vs.* Spittal, L. R., 5 C. P., 542, although they at first sight seem to be in point, yet in reality depend upon particular considerations of practice and enactment which have no bearing whatever upon the general question before us.

To return to the present case, the plaintiff's right, of the infraction of which he complains, is the right to be paid money in Calcutta, and, in the view of the facts which I take, that right arises immediately out of the promise which the defendant made at Patna when he wrote the hoondee and there delivered it to Syed Ally's gomastah. It appears to me that the plaintiff's cause of action within the meaning of the words in Clause 12 of the Letters Patent is not merely the right of the plaintiff and the infraction of it both localized at Calcutta, but also includes the *factum* of the promise made at Patna. Consequently in my opinion, it did not wholly arise within the jurisdiction of this Court.

Assuming that the plaintiff's right to sue in this Court fails so far as it depends upon the locality of the cause of action, the Advocate General yet contends that it can be maintained upon the ground that the defendant carries on business in Calcutta.

The facts relevant to this point are that the defendant dwells and has a *cooty* at Patna. At that place, as his head quarters, he makes purchases of country produce, from time to time he sends what he so purchases either by boat or rail to some *arhut* at Calcutta, and then follows them himself. At Calcutta he takes lodging at the *arhut* where his goods are and himself sells them. He never employs the *arhutdar* or any other agent for this purpose. As soon as he has sold all his goods, he pays for his accommodation at the *arhut* a percentage on the amount they have so realized, and then returns to his home at Patna. An excursion of this kind lasts one or two months and sometimes more, and the interval between two excursions is of about the same length.

It is not clear whether or not the defendant was in Calcutta when the plaint was filed, but he was so when the summons was served on him.

On these facts I do not think that the defendant was at the commencement of this suit carrying on business in Calcutta within the meaning of Clause 12 of the Letters Patent. It appears to me that the carrying on business for the purpose of that Clause, must involve pretty much the same element of permanency as is necessary to convert a mere "staying" into "dwelling." Here the defendant was in Calcutta solely for the purpose of selling his goods; the moment he succeeded in getting them off his hands, he immediately returned to Patna. The time consumed in this process might be a few days or two or three months. I think that Patna was his permanent place of business, and that his coming to Calcutta was only a visit made in the course and for the purpose of that business.

On the whole, then, I am of opinion that this suit has been wrongly brought in this Court, and that I ought not to entertain it. Accordingly I reject the plaint with costs on scale No. 2, and I abstain from all discussion of the merits of the case.

* *See* Sutherland's Privy Council Reports, p. 425.

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The plaintiffs appealed from the above judgment on the following grounds:—

First.—That on the evidence the defendant ought to have been held to be subject to the Ordinary Original Civil Jurisdiction of this Court by reason of his carrying on business in the town of Calcutta at the time of the commencement of this suit.

Second.—That the defendant ought to have been held to be subject to the said jurisdiction by reason that the plaintiff's cause of action in this suit arose within the local limits of the said jurisdiction.

Third.—That the said suit ought not to have been dismissed for want of jurisdiction in the Court, but the same ought to have been decreed in favor of the plaintiffs.

Lowe for the appellant first addressed the Court on the question of jurisdiction, and contended that, taking the facts as found, the defendant was subject to the jurisdiction of the Court. He cited Greeschunder Bonnerjee *vs.* Collins, 2 Hyde, 83; Morris *vs.* Baumgarten, Coryton, 152; Umritnath *vs.* Kydd, 2 Hyde, 117; The Queen *vs.* the Judges of the Small Cause Court, 2 Tayler and Bell, 7. Chinnamal *vs.* Tulukannatammal, 3 Madras High Court Reports, 146, is distinguishable.

Marindin for the respondent, on the question of jurisdiction, cited Gray *vs.* Cook, 8 East, 336; Stephens *vs.* Derry, 16 East, 147; Holden *vs.* Newman, 13 East, 161; Shiels *vs.* The Great Eastern and Northern Railway Company, 30 L. J., Q. B., 332.

Lowe was then called on to address the Court on the general merits of the case. As to the time allowed to Syed Ally, he cited Fentum *vs.* Pocock, 5 Taunton, 192; Jones *vs.* Jones, 6 M. and W., 84; Byles on Bills, last edition, 245; *Ex-parte* Graham, 5 DeGex, M. and G., 356.

Marindin contra contended that Fentum *vs.* Pocock had been overruled, and was contrary to the principles of equity which have been since applied. He cited Oakeley *vs.* Pashelley, 4 Cl. and Fin., 207; Hollier *vs.* Eyre, 9 Cl. and Fin., 45; *Ex-parte* Glendinning, Bricks B. C., 519; Strong *vs.* Foster, 17 C. B., 201; Pooley *vs.* Harradine, 7 E. and B., 431; The Mutual Loan Association Company, 28 L. J., C. P., 108; Rayner *vs.* Fussey, 28 L. J., Ex., 132; Taylor *vs.* Burgess, 29 L. J., Ex., 7; Greenough *vs.* M'Clelland, 30 L. J., Q. B., 15; Laurence *vs.* Walmsley, 31 L. J., C. P., 143; Bailey *vs.* Edwards, 4 B. and S., 761.

Lowe replied. He also referred to 1 Lindley on Partnership, 452; Brown *vs.* Gordon, 16 Beavan, 302; Price *vs.* Edmonds, 10 B. and C., 578; Manley *vs.* Boycot, 22 L. J., Q. B., 265; Chity on Bills, 284, to show that this is a promissory note, and not a bill.

The Judgments of the Appellate Bench were delivered as follows:—

Norman, J.—The first question upon this appeal is whether the High Court has jurisdiction to entertain the suit. The ground on which the jurisdiction was chiefly rested when the case was before Mr. Justice Phear, was that the cause of action arose in Calcutta, and this is the point dealt with at length in his judgment, which, on that point, has not been assailed by the appellant.

But it has been contended before us that the defendant, at the time of the commencement of the suit, "did carry on business or personally work for gain" within the local limits of the ordinary original civil jurisdiction of the High Court, and therefore that, by Clause 12 of the Charter of 1865, the High Court was empowered to try and determine the suit. The facts on this point are as follows:—The defendant, Bhugwan Doss, says he resides at Allamgunge, in Patna, and has a head office, *cooty*, at Marugunge, which is also at Patna. For many years past he has been in the habit of sending down country produce to Calcutta 5,000, 7,000, or 10,000 rupees' worth at a time. The defendant used formerly to send his goods to the *arhut* of Ishenchunder Sen in Pathooriaghatta; but latterly to that of Nursing Chunder Biswas. The defendant says he used to come to Calcutta sometimes twice, and sometimes three, four, or five times in the year. He says he used to put up,—that is, lodge and transact his business,—at the *golah* of the *arhutdar*. He used to sell the goods, receive the money, and make all payments, as well of bills drawn against the goods, as otherwise, himself. For this purpose, on each visit, he would remain one, two, three, four, or five months at a time as circumstances might require. The defendant paid to the *arhutdars* a commission of 12 annas per cent. on the price of the goods sold, and a small allowance called *choothee;* he paid no rent. The summons was served on the defendant in Calcutta three days after the institution of the suit. The gomastah of Hurjeebun Doss proves that five days before the summons was served, he saw the defendant at Nursing Chunder Biswas's *arhut* in Pathooriaghatta. The defendant was engaged talking to brokers and negotiating the sale of country produce. It is thus proved that the

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defendant habitually resorted to Calcutta for the purpose of carrying on trading operations on a considerable scale, remaining there for the purpose of such business for months at a time, and that it was during one of his visits to Calcutta for such purpose that the suit was instituted.

Unless some artificial construction is to be put on on the expression "carry on business" in the Charter, I think that it must be pronounced that the defendant, at the time of the commencement of the suit, did "carry on business" or "work for gain" within the local jurisdiction of the High Court.

Mr. Marindin for the respondent cited, amongst other cases, Shiels *vs.* The Great Northern Railway Company (30 L. J., Q. B., 331). For the decision in that case, which turns on the construction of the term "shall dwell or carry on his business" in the 9 & 10 Vict., c. 95, s. 60, it is enough to say that the Court held that a Railway Company cannot be said to carry on "its business" in a particular district, merely because it has a station where tickets are issued and contracts in relation to the carriage of goods are made. The issuing of such tickets and the like is not the "business" of a Railway Company, being a very small part of, or one of, the transactions connected with that business. Mr. Justice Hill, whose judgment was read and relied on, says :—"I do not mean to say that a private trader or firm may not carry on business within the meaning of the statute in more than one place." In Mitchell *vs.* Hender (23 L. J., Q. B., 273), the defendant was a surgeon, residing within the jurisdiction of the County Court of Liskeard. The cause of action was work done by the plaintiff for the defendant at a mine within the jurisdiction of the Launceston County Court. In order to deprive the plaintiff of his costs, and to show that the Superior Courts had not a concurrent jurisdiction under the 9 & 10 Vict., c. 95, s. 128, the defendant showed that "he was in daily attendance upon his patients as surgeon, apothecary, and *accoucheur* within the Launceston district." Coleridge, J., held, that this was enough to show that he carried on his business there. He says:—"If the defendant was moving about doing the work of his business and the effecting of it within the Launceston jurisdiction, he comes, I think, within the words of the Act." In the Keynsham Blue Lias Lime Company *vs.* Baker (2 H. & C., 729), it was held, that a registered Joint Stock Company for the manufacture and sale of goods carried on business at the place of manufacture and sale, not at the registered office of the Company where the directors used to meet and transact their business. These cases show clearly, first, that it is not material that the place of the defendant's permanent residence is Patna; and, secondly, that a party may carry on business, or work for gain, within the meaning of such a clause as that with which we have to deal, in more places than one. I may add that, for myself, I have never seen reason to doubt the correctness of the decision in Greesh Chunder Bonnerjee *vs.* Collins (2 Hyde, 79), which is a stronger case than that now before us.

We have therefore to consider whether the plaintiffs are entitled to a decree upon the merits. The facts are as follows:—

The firms of Sheikh Syed Ally and Bhugwan Doss had had for a long time dealings with each other. Bhugwan Doss used to draw hoondees at Patna on his firm, at Calcutta, and sell them to Sheikh Syed Ally at Patna. Sometimes Sheikh Syed Ally only paid a portion of the consideration. The hoondee in suit was drawn at the *cooty* of Sheikh Syed Ally in Patna by Bhugwan Doss, on his own firm of Bhugwan Doss at Calcutta. It was stipulated that the value should be paid by the firm of Sheikh Syed Ally within three days. The plaintiffs, who carry on business in Calcutta, were in the habit of purchasing hoondees from the Calcutta firm of Sheikh Syed Ally. On the 2nd day of the dark side of the moon in Assin, Sumbut 1924, or, in other words, the 15th day of September 1867, Muckhunloll Chowbay, a broker, the agent of Syed Ally, brought the hoondee now in suit to the plaintiffs, who purchased it, paying (deducting the discount) Rs. 2,468 or thereabouts. The hoondee purports to be drawn by the defendant's firm, Bhugwan Doss of Patna, on Bhugwan Doss of Calcutta, for Rs. 2,500 deposited by Sheikh Syed Ally, on the 15th day of the light side of the moon in Bhadro 1924 (13th September 1867) payable 41 days after date. The hoondee purports to be accepted by Bhugwan Doss in favor of Sheikh Syed Ally Sahib.

The defendant admits that the bill was drawn by himself, but denies that he accepted it; and though from the mode in which the defendant has put forward that denial there seems good reason to doubt whether the acceptance is not really his, we must treat it as not proved that the acceptance is in the handwriting of the defendant or of his gomastahs.

The plaintiffs say that, at the time they discounted the hoondee, they did not know

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that Sheikh Syed Ally had not paid the full consideration for it. They took it in the usual course of business. Sheikh Syed Ally failed to pay to the defendant the consideration for the acceptance as stipulated by him on the 3rd day after the bill had been drawn. Gopeeloll Dullal, the broker who had been employed both by Syed Ally and Bhugwan Doss in the negotiations for drawing the bill on behalf of Bhugwan Doss, pressed Monohur Lall, the gomastah of Sheikh Syed Ally at Patna, for payment of the consideration, and thereupon Monohur Lall wrote a letter to Sheikh Syed Ally's firm in Calcutta, and handed it to Bhugwan Doss. The letter was as follows (reads letter of 3rd day of the dark side of the moon in Assin 1924.) Before the hoondee fell due, Syed Ally's business failed. The plaintiff, Hurjeebun Doss, went to the defendant in Calcutta, and told him that Syed Ally had failed, and that the defendant must pay the bill. The plaintiff says, the defendant took the hoondee in hand, and said, "I have not accepted it." The plaintiff says, "I gave him an answer to that, and asked whose handwriting is this? (meaning by whom was it drawn?) He said, it is drawn by me. I said the hoondee is written in your own hand, and is signed by you; and now that his business has failed, you say, you have not written it. It won't do. He said, I have not accepted it, nor will I pay it. Do what you like." The defendant's account of this interview is: "I came to Calcutta twenty-five days after I drew the hoondee. After coming to Calcutta I saw the plaintiff Hurjeebun Doss. He came to me first. When he came, he said to me, is this hoondee accepted by you? I said it is not, nor have I received the money. He said, but it is drawn by you. I said, it is true it is written by me, but I received no consideration. All I got was a letter written by Syed Ally to his own gomastah. I got no money for it." The bill was again presented to the defendant, when it became due. He says: "The attorney's man who accompanied Hurjeebun or Peetam Doss, said, are you going to pay the amount of this? I said I have not received any money for this, nor have I given any acceptance to it. I will not pay the amount of this. You may go and take it from Syed Ally." On this occasion there seems to have been no reference to the letter written by Syed Ally to his own firm in Calcutta. There seems to be no reliable evidence that the defendant, or any one on his behalf, informed the plaintiffs of the true state of the defendant's position with respect to the hoondee. Peetam Doss went up to Patna, before the bill became due, to see if he could get payment. Gopeeloll Dullal—in answer to a question, "were you ever questioned by the plaintiffs or any and what person on their behalf as to the said hoondee; if yes, who were present, and what was said?"—answered, "Yes, I was questioned by Peetam Doss on behalf of the plaintiffs as to the said hoondee in Isree Persaud's house and before him. Lekraj Sahoo, father of Bhugwan, was also present there. I informed Peetam Doss of all the circumstances in connection with the hoondee which I have stated in full in my answer to the third question. Isree Persaud said that he would send for Mohun Loll, and settle the matter." But Gopeeloll is contradicted both by Isree Persaud and Peetam Doss, and I cannot accept his statement, because I think it is clear that the defendant, at the time of this interview, was endeavouring to escape all liability on the bill by contending that he had not accepted it, or that he had received no consideration. If the defendant really told Hurjeebun that all that he got was a letter written by Syed Ally to his own gomastah, he told Hurjeebun what was false; he suppressed the fact that he got Syed Ally's promise to pay in three days. But I believe that he made no statement that he had got a letter written by Syed Ally to Hurjeebun Doss. To have done so wou have been to have told Hurjeebun Doss, "you will have no difficulty with that bill; it is all right; I am liable just as any other person who has accepted a bill for the accommodation of the payee is liable." Unable to get payment from Syed Ally, Peetam Doss, by the assistance of his friends at Patna, eventually arranged to take from Sheikh Syed Ally two bills of Rs. 2,500 each, which the firm of Hurjeebun Doss held, the sum of 2,200 rupees down, and the rest by certain instalments. The agreement was as follows:—

"This auspicious letter is written to the most worshipful Bhaee Hurjeebun Doss and Peetam Doss from Patna by Sheikh Syed Ally Sahib whose salutations you will accept. Further, I discounted with you at Calcutta hoondees for Rs. 5,000, which hoondees, on Peetam Doss coming to Patna, were paid off in the following manner:—A hoondee for Rs. 2,500 drawn by Bhugwan Doss upon Bhugwan Doss, value deposited by me on the 15th day of the light side of the moon in Bhadro (13th September), payable 41 days after date in Company's rupees, and a hoondee for Rs. 2,500 drawn by Ram Sahoy Ram, value deposited by me on the 14th day of the light

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side of the moon in Bhadro (12th September), payable 41 days after date in Company's rupees. I discounted hoondees of this description, out of which I paid Rs. 2,200 in cash through Syed Mahomed Hossein Khan Sahib; the balance, Rs. 2,800, is due. The condition for payment of which is this; the particulars thereof are as follows:—

"Rs. 300. Date the 5th day of the light side of the moon in Aghran 1924 (21st December 1867).

"Rs. 1000. The 5th day of the light side of the moon in Magh 1924 (29th January 1868).

"Rs. 750. The 5th day of the light side of the moon in Bysack 1925 (27th April 1864).

"Rs. 750. The 5th day of the light side of the moon in Sawan 1925 (24th July 1868.)

"I made an agreement of this sort, and I will pay the whole of the amount, inclusive of interest at 8 annas, and will take the two hoondees from Bhaee Ramkissen Futteh Chand with whom they are kept. Should I not pay the money according to this condition, then you have the authority, and I will pay it with protest charges. Further, all is well. Date Sunday, the 7th day of the light side of the moon in Kartick, Sumbut 1924 (3rd November 1867). Further, I paid into the hands of Peetam Doss Rs. 160 on Monday, the 2nd day of the light side of the moon in Assar, Sumbut 1925 (22nd June 1868)."

The point which has been argued before us with great ingenuity by Mr. Marindin and Mr. Evans for the defendant, is that the effect of the letter written by Monohur Loll, the gomashta of Sheikh Syed Ally of Patna to Sheikh Syed Ally of Calcutta was to alter the character of the defendant's obligation, and to make him liable as a surety only for Sheikh Syed Ally upon the bill in suit; that the plaintiffs, at the time of making of the agreement of the 7th of the light side of the moon in Kartick (3rd November) had notice that the defendant was merely a surety for Sheikh Syed Ally; that the agreement which gave time to Sheikh Syed Ally, the principal, operated as a discharge to the defendant, the surety, although at the time of the discount of the hoondee by the plaintiff that relation did not exist between Sheikh Syed Ally and the defendant.

I think, however, that there is no satisfactory or reliable evidence that at the time when, by entering into the agreement of the 7th day of the light side of the moon in Kartick (3rd November), the plaintiffs gave time to Sheikh Syed Ally, the plaintiffs knew or had notice that the defendant stood in the position of a surety, even if he was a surety only.

I desire to say that I have heard nothing in the course of the argument which convinces me that, if an obligation is entered into by two persons A and B with a third C, by which the two obligors are both liable to the third C as principals, A and B can by any subsequent arrangements amongst themselves, without the privity or assent of C, relieve themselves or either of themselves of the obligations which are incident to the character of principal, and by mere notice of such arrangement compel C to forego his right to treat them both as principals. Lord Lyndhurst, in Oakeley *vs.* Pasheller (4 Cl. & Fin., 207; *see* 232; S. C., 10 Bligh, N. S., 548; *see* 586), asks the question, "Can you cite any authority to the effect that two principal debtors could by arrangement between themselves convert one into a surety only for the other principal debtor?" Mr. Pemberton and Mr. Leigh, in reply to that question put during the argument in the House of Lords, do not attempt to say that anything of the sort could be done. But they argue that, in point of fact, Sir Charles Oakeley, the creditor, by adopting an arrangement by which the new debtor became liable to him, accepted Reid and Kynaston as the principal debtors, leaving and looking to Sherard's executors as sureties for the new obligation. I think it clear that an obligor cannot, without the consent of the obligee, alter the position of the obligee, or take away his rights as they existed at the time when the obligation had its inception. In the case of Oakeley *vs.* Pasheller (*see* 10 Bligh, N. S., 578), if the judgment of Sir John Leech be examined carefully, it becomes clear that he also noticed the point that Sir Charles Oakeley, the obligee, had adopted the new firm as principal debtors, and thereby consented to accept the liability of Sherard's executors as that of sureties; and I may add that this is the view which is taken of the case in Lindley on Partnership, Vol. I., p. 452. In the present case, Bhugwan Doss sold his bill on credit, as drawer and acceptor, or drawee of a bill on his own firm sold for value; he was liable on that bill as principal. On the failure of the vendee of the bill, Syed Ally, to pay the consideration, he, for his own purposes, or for some consideration of which we know nothing, chose to forego his right to proceed at once against Sheikh Syed Ally. Instead of enforcing the remedy then immediately open to him, he chose to take from

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Syed Ally an engagement to provide for the bill at maturity. He did this without communicating with Hurjeebun Doss, who in the mean time had taken the bill in the ordinary course of business for value. The effect of the new arrangement was to alter the whole character of the bill and of the liabilities of the parties to it. I think that this could not be done without the assent of Hurjeebun Doss, the holder of the bill. I think that, as between himself and Hurjeebun Doss, Bhugwan Doss was the principal debtor on the hoondee when the hoondee was discounted by the plaintiff, and that, as between the defendant and Hurjeebun Doss the plaintiff, the plaintiff has a right to hold him to his original obligation as principal debtor to this hour. The mere fact that the plaintiffs, on discovering that there was something wrong about the bill, were willing to proceed, and did proceed, against Syed Ally in the first instance, in no way alters his position.

But even if it be admitted that notice can have the effect of creating an equitable duty on the part of the obligor to use his rights in such a way as not to prejudice the interests of a surety, I think that it must be admitted that such a notice of the existence of rights wholly unknown to the obligee must be an honest, fair, and full disclosure of the relations of the obligors as between themselves, so as to enable the obligee to know and effectually exercise his own rights. The principle on which insurers are bound to disclose not only all the facts which they believe to be of importance, but all the facts that might influence the party about to insure, seems to me to apply to cases like the present. I think no equitable right can be based on a notice which conceals or suppresses facts which it is or may be essential to the interest of the obligor that he should know. Such, it is clear, would be the effect of the notice which the defendant says that he gave. Had the defendant told the plaintiffs that he had originally sold the bill on credit, and had, on failing to get payment, accepted the letter of 3rd Assin (16th September), the plaintiffs would probably have called on the defendant for immediate payment according to his contract with Syed Ally when they drew the bill. Of the cases cited, there is not one which, when carefully examined, will be found to govern the case before us.

I think that the defence wholly fails, and that the plaintiffs are entitled to a decree for the amount claimed.

Macpherson, J.—The plaintiffs' suit was dismissed on the ground that the Court had no jurisdiction to entertain it, because the cause of action did not arise in Calcutta, and because the defendant did not, at the time of the commencement of the suit, "carry on business" in Calcutta, within the meaning of Section 12 of the Letters Patent of 1865. It is urged in appeal that, whether the cause of action did or did not arise in Calcutta, the defendant was certainly carrying on business there when the suit was commenced. I am of opinion that the appellants are right in this contention, and that therefore the Court below was wrong in holding that the defendant was not subject to the jurisdiction in this suit. Taking the defendant's own statement, his place of permanent residence is at Allumgunge in Patna, and he has a *cooty*, or place of business, in Marugunge, also in Patna. His principal business consists in buying country produce at Patna and sending it down to Calcutta for sale, himself following every consignment, himself selling it in Calcutta, and himself receiving the proceeds. He comes to Calcutta, he says, three, four, or five times, and sometimes only twice in the course of a year, remaining in Calcutta three, four, or five months at a time. He puts up at the *golah* of the *arhutdar* in whose godowns his goods are stored, and in whose premises he lives; he conducts all sales, and realizes the proceeds himself, employing no agent in the matter; then returns with the proceeds to Patna, where he remains for a month or two, preparing and despatching fresh consignments, and starting again for Calcutta, so as to meet them on arrival there. This goes on throughout the year, and has been going on for five or six years. He has been in the habit of drawing bills at Patna, on himself at Calcutta, and of paying them there. He has kept books in Calcutta of his transactions there. While absent from Patna, his father looked after his business there, the only other business spoken of being a dealing in hoondees drawn by himself at Patna on himself at Calcutta. The hoondees have usually been paid by him out of the moneys realized here by the sale of his goods. It appears to me that this is clearly such a carrying on of business in Calcutta as makes the defendant subject to the jurisdiction in this suit. For the defendant the case of Shiels *vs.* The Great Northern Railway Company was much relied on. But that case seems to me to have really little bearing upon the facts with which we have to deal at present. A Railway Company which, in a certain sense, carries on business at every station

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in Great Britain, where it makes contracts for the conveyance of, and receives passengers or goods to be conveyed, is in a position wholly different from that of a trader who exercises his calling partly in one and partly in another of two districts. There no doubt would be manifest inconvenience, and some injustice, as Mr. Justice Hill says in Shiels *vs.* The Great Northern Railway Company, if the words "carry on business" were taken in their most extended import, "for then a Railway Company against whom a cause of action within the jurisdiction of the County Courts Act arose, might be sued in any County Court in the Kingdom at the option of the plaintiff, provided the Court had a station within the district of such County Court, without any regard to the place where the cause of action arose, or to the fact that the officers or servants of the Court at such last-mentioned station knew nothing of, and had nothing to say to the affairs or business of the Court, other than denying the instructions of the directors, and acting in conformity with the regulations of the Court at the principal station where they were employed." Not one, however, of the inconveniences contemplated in this passage of Mr. Justice Hill's judgment are to be found in the present case, if it be held that this Court has jurisdiction. For the defendant is sued on a hoondee drawn by himself and payable in Calcutta by himself, he having, moreover, been in Calcutta when it fell due, and himself knowing everything connected with the transaction. So far, therefore, as the argument *ab inconvenienti* may have anything to do with the conclusions arrived at by Mr. Justice Hill, that argument is wholly out of place in this case. Mr. Justice Hill continues :—"Many illustrations might be put to show that the words 'carry on his business' must receive some limitation, even in the case of private individuals. A builder, whose place of business is in one County Court district, takes a contract for the erection of extensive buildings in another district, the completion of which will require a considerable time, and for the purpose of such buildings he erects workshops thereat. In one sense, the builder carries on his business in the last-mentioned district, but he does not do so within the meaning of the enactment, see Gorslett *vs.* Harris (29 L. T., 75). Then he gives the case of "a dealer, whose place of business is in London, and who sells exclusively therein, but employs travellers to visit different parts of the country" making contracts for him; and he says it is clear that London is the only place in which he carries on his business. He adds, however, "I do not mean to say that a private trader or firm may not carry on business within the meaning of the Statute, in more than one place. The illustrations which I have used are merely for the purpose of showing that the words 'carry on his business' are not to be taken in this most extended sense." Fully adopting this declaration, I do not doubt that the decision in Shiels *vs.* The Great Northern Railway Company is perfectly right. Moreover, I am not inclined to cavil at the illustration as to the London dealer who has travellers acting for him in the country. As to the builder whose place of business is in one county while he is erecting buildings in another, Mr. Justice Hill's illustration will be perfectly sound in a certain state of facts, but not so in a certain other state of facts. If the builder's position in its general features resembled that of the Railway Company in Shiels *vs.* The Great Northern Railway Company, it would certainly be correct. But in this case of the builder, as in every case arising on the construction of these words "carrying on business," all depends on the particular facts proved in each particular case. No fixed or certain rule applicable to all cases can be laid down. That this was Mr. Justice Hill's opinion is apparent; and he expressly says that a private trader may "carry on business" in more than one place. The judgment in this case of Shiels *vs.* The Great Northern Railway Company was approved of and affirmed by the full Court of Queen's Bench in Brown *vs.* London and North-Western Railway Company (32 L. J., Q. B., 318). But in this latter case also it was evidently the opinion of the Court, that the "carrying on business" need not necessarily be confined to one place. Crompton, J., says: "I agree with Hill, J., that business must mean the general business carried on at the principal station. I am inclined to think that there may be cases in which the business of a Railway Company may be held to be carried on at two places. For instance, suppose a terminus at two places, like Liverpool and Manchester, and the meetings of the directors held as much at one place as the other, I do not see why the business may not be said to be carried on at both." Blackburn, J., says :—"The question turns entirely on the construction of the 60th Section, 9 & 10 Vict., c. 95. That was enacted with a view of regulating where defendants in general should be sued, and it would appear that the Legisla-

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ture thought that, in small cases, managed generally by the parties themselves, the most convenient place would be that in which the defendant either dwelt or carried on his business; contemplating such cases as a man having a place of business in Westminster and living in some suburban villa. But business can only be said to be carried on where it is managed. No doubt there may be cases where a man carries on more businesses than one, and in different places. But such cases are quite exceptional; and the place of business in general must be the place where the general superintendence and management take place." In the Keynsham Blue Lias Lime Co. *vs.* Baker (2 H. & C., 729), the business of Railway Companies is treated as in some degree *sui generis*. In this case the Company's business was to manufacture and sell their goods. The directors met in London, but the sales were made at the place where they got the material, and prepared it for sale, and that was held to be the true place of business. In Framjee Cowasjee Marker *vs.* Hormusjee Cowasjee Marker (1 Bom. H. C. Rep., 220) the Court (Sausse, C. J., and Arnould, J.) say: "To determine whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling, or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling, or occupation within the jurisdiction." The learned Judges then went into the facts, and found that the defendant was a retail dealer in European goods, having shops, and carrying on the business of selling those goods at various up-country stations, and having an establishment in Bombay, where goods were purchased or received from Europe and forwarded to the various shops of up-country. No sales were ever made in Bombay by the defendant or his servants there. The Court say: "The branch or agency established within the jurisdiction appears to have been limited to purposes other than those of sale or profit. Under these circumstances, we think that the defendant, as a retail dealer, gaining his livelihood by the profit upon sales of his goods, did not carry on business in Bombay so as to render him in that respect liable to the jurisdiction. In the present case 'sale' is made the test of carrying on the business of a retail dealer, and the place of sale is treated as the place of carrying on that business." If we apply a similar text to the case now before us, can it be doubted that the defendant was carrying on business in Calcutta. He in fact made his livelihood by the profits upon the sales of his merchandise in Calcutta. He expressly says he took no goods up-country with him for sale there. The only other means of livelihood was the dealing in hoondees drawn at Patna on himself in Calcutta; and this was also in itself a species of carrying on business in Calcutta, inasmuch as the hoondee business was intimately connected with, and in truth a part of, the other business of selling his merchandise in Calcutta. Unquestionably the more important portion of the defendant's business was transacted in Calcutta. The defendant says, his "Head Office" was in Patna. But what sort of a head office does he really show to have existed? He proves merely that when absent from Patna his father looked after his business for him. There is no evidence that the father ever transacted any business for him unless it may be that he occasionally drew hoondees in the defendant's name upon the defendant at Calcutta, to be taken up by the defendant there with the money realized from the sale of his goods. I cannot say that I have any doubt whatever that, under the circumstances, the defendant was carrying on business in Calcutta, and is therefore subject to the jurisdiction. Our own decision in the case of Greesh Chunder Bonnerjee *vs.* Collins is strongly in favor of this view of the question; and there is nothing whatever against it in the case of Chinnamal *vs.* Talukanatanmal, or in Subharya Muddali *vs.* Government (1 Mad. H. C. Rep. 286). Some question has been raised as to whether it is proved that the defendant was carrying on his business in Calcutta at the time the suit was commenced, even if he was so at the time the summons was served upon him. On the evidence, I have no hesitation in finding, as a fact, that he was carrying on his business in Calcutta at the time of the commencement of this suit.

Finding that the Court has jurisdiction, I proceed to consider how the case stands on the merits.

The plaintiffs seek to recover the amount of a hoondee for Rs. 2,500, dated the 15th of the light side of the moon in Bhadro 1924 (13th September 1867), drawn by the defendant at Patna on the defendant in Calcutta, payable forty-one days after date to Syed Ally or order. The defence is that the hoondee was an accommodation bill given by the defendant to Syed Ally for his accommodation and without consideration, and that the plaintiffs, after the hoondee had become due, and after

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the plaintiff had notice that the defendant was, as regards this hoondee, only surety for Syed Ally who was the principal debtor, gave time to the principal Syed Ally in such a manner as released the defendant, his surety.

It is quite clear that this hoondee (which being drawn by the defendant upon himself may be treated as a promissory note, whether the acceptance appearing upon it is a forgery or not—a question as to which I do not stop to enquire) was not an accommodation bill in its inception at the time it was taken by the plaintiffs. This is in fact admitted by Mr. Marindin; and whether admitted or not, it appears on the face of the defendant's written statement, in which he says (para. 4) that he drew the hoondee for himself at Calcutta at the request of Syed Ally who had promised to pay him the consideration in a day or two; and (para. 5) that Syed Ally having failed to pay the amount, informed the defendant that the amount of the hoondee would be paid at Calcutta by his gomastah, and gave the defendant a letter to that effect to his (Syed Ally's) gomastah in Calcutta. In his deposition the defendant says: "I received nothing whatever from Syed Ally. I had had dealings with him of this sort. I had drawn hoondees, of which he paid me down a portion. On this occasion he paid no portion. I had no goods or funds of his." In cross-examination he says: "I draw bills on myself at Calcutta and pay them. I had many bill transactions with Syed Ally, very many; I drew the bills at Patna, and gave him bills to the extent of 50,000 or 60,000 rupees, during the three years his transactions went on with me. I drew bills also for others * * * * With the proceeds of my goods I take up the hoondees. I do not bring piece goods here. I buy nothing. I do not take any hoondees here. I meet hoondees if they come from there; and if any money is left in my hands, I take it with me. * * * * When away at Patna, I draw bills at Patna on myself in Calcutta. If I am not here, I accept them when I come down." Gopee Loll Dullal, a witness examined for the defence (under commission) says, that he was the broker employed by both parties at the time the hoondees were drawn by the defendant; and that the statements made by the defendant, in the 4th para. of his written statement, is true,—namely, that the defendant gave the hoondee to Monohur Loll, the gomastah of Syed Ally, upon his undertaking to pay the commission thereof in three or four days. Then he says: "I did, on behalf of the defendant, give to Monohur Loll, and demand money for the hoondee. I demanded it when the time within which Mohun Loll had promised payment had expired; that is to say, three or four days after the delivery of the hoondee." In its inception, therefore, it was a hoondee given by the defendant to Syed Ally for valuable consideration, the consideration being the promise to pay the defendant at Patna within three or four days. The plaintiffs became holders of the hoondee for value on the night of the day after that on which it bears date,—that is to say, before the expiry of the time within which Syed Ally had promised the defendant to pay him the value.

The case for the defendant is that when Syed Ally made default at the end of the three or four days, the defendant pressed him, and thereupon Syed Ally (by his gomastah Monohur Loll) gave him a letter to his (Syed Ally's) Calcutta firm, directing the latter to pay the hoondee on due date, as he had not paid for it at Patna. On the evidence, it is doubtful whether this letter ever was received by the Calcutta firm of Syed Ally. Monohur Loll, the Patna gomastah of Syed Ally, says, he wrote such a letter and sent it by post to Beharee Loll, the Calcutta gomastah of Syed Ally; and that he gave a letter to the like effect to Bhugwan Doss. This is corroborated by Gopee Loll Dullal, and also by the defendant himself, who says the letter produced and dated the 3rd of the dark side of the moon in Assin 1924 (16th September 1867) is the letter which he personally got from Monohur Loll. But Baharee Loll, the Calcutta gomastah of Syed Ally, was examined as a witness for the defendant, and denies ever having received any such letter by post or otherwise, while the defendant himself does not say that he ever presented his letter to the Calcutta firm, or made any demand whatever against Syed Ally upon it at any time.

Soon after this letter was given by Monohur Loll, Syed Ally being in difficulties, stopped payment. The plaintiffs evidently had some communication with the defendant about that time as to whether the hoondee would be paid when due. The defendant says that on this occasion he said he would not pay it, because the acceptance on it was not his, and because he had received no consideration for the hoondee from Syed Ally. The plaintiffs deny that anything was said about want of

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consideration. However that may be, when the hoondee fell due, it was presented for payment to the defendant, and he absolutely refused to pay it, denying that he had accepted it; whereupon it was protested.

Up to this point in the case, there is no doubt as to the defendant's liability. As the drawee for valuable consideration of a hoondee on himself (or as it may be put, as the maker of a promissory note) in favor of Syed Ally, for which the plaintiffs paid full value, the defendant was undoubtedly liable to pay the plaintiffs the amount of the hoondee when due, whatever may have been his relations with Syed Ally at the time the hoondee reached maturity.

But it is contended that, owing to subsequent events, the defendant is no longer liable. It is said that, by reason of the agreement to pay in Calcutta entered into by Monohur Loll, the position of the parties was changed, so that, as between themselves, Syed Ally was the principal debtor on this hoondee, and the defendant merely his surety; that before the hoondee fell due, the plaintiffs became aware that the defendant was only surety for Syed Ally; that, after it was presented for payment to the defendant, and repudiated and dishonored by him, the plaintiffs entered into an agreement to give time to Syed Ally, and that this agrement operated as a release to the defendant. I do not, however, think, that the letter given by Monohur Loll, or the agreement which led to that letter being written, had the effect of altering the position of the parties so as to make Syed Ally the principal in this matter, and the defendant his surety only. The defendant and Syed Ally were both of them traders carrying on business at Patna and Calcutta. The defendant had considerable transactions in hoondees in connection with his trade of selling in Calcutta merchandize brought down by him from Patna. As he himself says; the practice was that the hoondees should be drawn by his Patna firm (*i.e.*, himself at Patna) upon his Calcutta firm (*i.e.*, himself at Calcutta), and that the hoondees thus drawn should be paid by him, when in Calcutta, out of the proceeds of the goods sold by him there. Living as he did mainly by bringing down country produce from Patna for sale here, it was manifestly for his benefit and convenience to draw and sell his hoondees in Patna so as to be placed in funds there wherewith to pay for purchases made. This being the nature of his business, the defendant, in the ordinary course of it, sold this hoondee to Syed Ally, with whom he had had many such transactions, and who promised to pay the price of the hoondee in two or three days. He did not pay as he promised; and being pressed for the money, he came to terms with the defendant, and agreed that, instead of paying them at Patna, he would pay on a later date at Calcutta. Thereupon the letter now produced, and relied on by the defendant, was given by Syed Ally. I cannot see that this latter agreement alters the position of the parties, except that the payment of the price of the hoondees was postponed, and the place of payment changed from Patna to Calcutta. After the letter was given, there was just as much as ever a contract binding Syed Ally to pay the defendant the price of the hoondee; the date and place of payment alone were altered. This is no case of principal and surety at all, though it is a case in which the defendant, when called upon to pay the amount of the hoondee, might well have the feeling that practically he had received no consideration for it, as Syed Ally had failed to fulfil his promise. But every creditor, who has parted with his goods or money and does not get paid for them by his debtor, ordinarily has a precisely similar feeling. But even if the relation between Syed Ally and the defendant was converted into one

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of principal and surety, the defendant is not in my opinion released, even if the plaintiffs did give time to Syed Ally.

Mr. Marindin argues that, if the relation of principal and surety exists, time given to the principal will exonerate the surety, if the creditor, when giving time, has notice that the one is principal and the other is surety only, even although he had no notice of the fact when the original contract was entered into. And he argues further, that it does not matter when the relation of principal and surety comes into existence, provided it does so prior to the giving of time, and the creditor when giving time is aware that it exists. However startling these propositions may seem at first sight, they appear to be borne out by the decisions and the *dicta* of the Judges in the case of Pooley *vs.* Harradine, Taylor *vs.* Burgess, Greenough *vs.* M'Cleland, and Bailey *vs.* Edwards. But the present case, taking it as one of principal and surety, goes in its facts far beyond any of these cases. In every one of them the surety had been surety from and at at the time of the original contract. Here the alleged surety was admittedly a principal when the bill was drawn by him, and when it was taken for value by the plaintiffs. It is true that, in Bailey *vs.* Edwards, Mr. Justice Blackburn says that it was decided in Oakeley *vs.* Pasheller that the surety will be discharged if the creditor, having notice that he is surety, gives time to the principal, even although the relationship of principal and surety did not come into existence until a date subsequent to that of the original contract. But the decision of Sir J. Leech, M. R., in Oakeley *vs.* Pasheller, is stated too broadly when thus expressed, for a careful perusal of the report satisfies me that in that case the surety was held discharged, because the creditor had, with notice of the arrangement come to by the parties between themselves after they had become liable to the creditor as judgment-debtors, by his conduct recognised and assented to the new arrangement. The marginal note given to this case is not limited as it should be, and is not warranted by the facts. The latest case I have found bearing on the subject is Ewin *vs.* Lancaster (6 B. & S., 571). There also the surety had been only a surety from the commencement. Bailey *vs.* Edwards is no doubt mentioned with approval; but it is referred to by Cockburn, C. J., merely as a case in which it was held that the giving time to a prior indorser of a bill of exchange discharged an accomodation acceptor. There is no decided case that I know of which actually governs the case now before us, except so far as Oakeley *vs.* Pasheller, and the *dictum* of Blackburn, J., founded upon that case, may be said to govern it. I am clear that Oakeley *vs.* Pasheller does not go so far as it is said to have gone; and that being so, I am not prepared to act upon the rule which is supposed to be deducible, but has never in any contested case been decided to be deducible, from it. There is another point in which this case differs from all of the reported cases. It is this that, when the hoondee fell due, and when the defendant was undoubtedly liable upon it as principal, it was duly presented to him for payment, and he then not only did not pay it, but wholly repudiated all liability on the hoondee on the ground that he had never accepted it. It is possible that this refusal to pay, and repudiation of liability, might have an important bearing on the question of the equities which the defendant sets up as against the plaintiffs. On this, however, it is unnecessary for me to enter at length or express any opinion.

Appeal allowed.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 3rd June 1871.

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Jurisdiction—Magistrate of District—Deputy Commissioner—Appeal—Sections 14 and 342, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Deputy Commissioner of Luckimpore, in the case of Boron Dhoom.

A Deputy Commissioner in a Non-Regulation Province comes, under Section 14 of the Code of Criminal Procedure, under the designation of Magistrate of the District, and is competent to decide upon an appeal preferred under Section 412 from an order of a Subordinate Magistrate who has exercised jurisdiction in a case in which he had no jurisdiction.

Reference.—One "Boron," a Dhoom, charged certain persons before the Police with having stolen his fish and fishing nets. On enquiry by the Police the case was found false, and a warrant was taken out against the false informant. From the evidence it appears that the case was false. The complainant and accused having had some altercation the complainant was assaulted, but there was nothing to show a theft had been committed, and on the Police making enquiry complainant's fishing-nets were found in his house.

The lower Court having powers of a Subordinate Magistrate, 1st class, convicted the accused person under Section 182 of the Indian Penal Code.

The offence committed has been ruled to be that falling under Section 211, and not that under Section 182.

The evidence shows that the real offence committed is beyond the jurisdiction of the lower Court.

Judgment of the High Court:—

Ainslie, J.—The Deputy Commissioner is right as to the offence being one which should have been dealt with under Section 211 rather than under Section 182 of the Penal Code, and also as to the Subordinate Magistrate not having jurisdiction in cases under Section 211; but as all orders of the Subordinate Magistrate are appealable to the Magistrate of the District under Section 412 of the Criminal Procedure Code, and as the Deputy Commissioner under Section 14 comes within the designation of Magistrate of the District, he was competent to deal with the appeal preferred to him and to dispose of all questions of law and fact arising on it.

The case with the papers will be returned to the Deputy Commissioner to be disposed of.

The 3rd June 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Warrant—License—Municipal Commissioner—Act III of 1864, B. C.—Chapter XV, Code of Criminal Procedure.

(Miscellaneous Case.)

Bissessur Chatterjee, *Petitioner.*

Baboos Debendro Chunder Ghose and *Bungshee Dhur Sein* for the Petitioner.

A Magistrate or Municipal Commissioner has no power under Act III of 1864, Bengal Council, to issue a warrant for the arrest of a person who may have failed to appear on a summons to answer a charge under Section 27 of that enactment for using premises as a straw or wood depôt without a license.

Per Loch, J.—The provisions of Chapter XV of the Code of Criminal Procedure are not applicable to offences under Act III of 1864, B. C.

Loch, J.—On the 29th April last, a petition was presented on the part of Bissessur Chatterjee accompanied by an affidavit from Hurry Mohun Dey styling himself the Gomastah and agent of the said Bissessur Chatterjee, to the effect, that his employer had a wood depôt situated at No. 4-1 Strand Road, Bhowanipore; that on the 21st April, a summons from the Municipal Commissioners of the Suburbs of Calcutta had been

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served on him, requiring him to appear personally or by agent, on 22nd April, before the sitting Commissioner at Alipore to answer to a charge for breach of Section 77 Act III. 1864, B. C., by having used the premises No. 4-1 Strand Road as a wood depôt without license from the Commissioners; that in obedience to the said summons, he, Hurry Mohun, as agent for Bissessur Chatterjee, did attend before Mr. Sterndale, a Magistrate and Commissioner of the Suburbs of Calcutta, on the 22nd April, and was ordered by the said Magistrate to appear again before him on the 24th idem; that in accordance with the said order he, Hurry Mohun Dey, did again appear before Mr. Sterndale on 24th April and offered to answer to the charge mentioned in the summons and to pay any fine which his master might be liable on conviction; that the Magistrate, without disposing of the case or giving heed to his prayer, told him that a warrant for the arrest of his master, Bissessur Chatterjee, would be issued, and directed a peon to detain him, the said Hurry Mohun, in the office; that two warrants were subsequently issued by the said Magistrate for the arrest of the said Bissessur Chatterjee. The prayer of the petitioner Bissessur Chatterjee was that the High Court would order the withdrawal of the warrant, as the circumstances did not justify its issue.

The proceedings were called for and the Magistrate was directed to submit any explanation he had to offer.

On 1st May 1871, Mr. Sterndale, a Magistrate and Commissioner of the Municipality of the Suburbs of Calcutta, forwarded the proceedings to the High Court, and stated that he was unable to conjecture what explanation was required in the matter; that the case, so far as it had proceeded, was perfectly simple. The petitioner, having been summoned to appear before the sitting Commissioner at Alipore on the 22nd April, wilfully neglected to appear, and a warrant was issued to compel his attendance; that as the petitioner was not in the Suburbs, a fresh warrant addressed to the Deputy Commissioner of Police, Calcutta, had been prepared, but would not issue till the result of the application to the High Court was known. In a subsequent letter of the same date, the Magistrate and Commissioner of the Municipal Commissioners gave an explanation of the circumstances of the case. He stated that Hurry Mohun did not appear in the Court of the sitting Magistrate on the 22nd, nor, consequently, did he receive any order from the sitting Magistrate to attend on the 24th; that on the 24th when he was present in Court, he was informed that his appearance was not sufficient, nor could the case be proceeded with against his master through him, as he was not a duly authorized agent and produced no authority; that no order for his detention was made, and that no representation was made on either the 22nd or 24th that Bissessur Chatterjee could not attend on account of illness.

The explanation of the Magistrate is a complete answer to the allegations made in the affidavit put in by Hurry Mohun, but there still remains the question whether the Magistrate was, under the circumstances, justified in issuing a warrant for the arrest of Bissessur Chatterjee, and a further question has been raised whether under the law under which he professed to act the Magistrate had authority to issue a warrant.

Act III of 1864, Bengal Council, no where lays down any distinct course of procedure. It certainly provides for notices to be served in particular instances before the Municipal Commissioners can proceed to take action, but it does not provide for the service of summons, and were it not for the incidental mention of summons with notices in Section 81, it might be questionable whether a summons requiring the attendance of a party could be issued under the Act.

The Act (III of 1864, Bengal Council) no where provides for the issue of a warrant, nor does it make any of the provisions of the Criminal Procedure Code applicable to the investigation of offences under the Act; nor is there any provision in it that it is to be read as part of Act XXI. 1857. But it may be said that the Municipal Commissioner was acting in his capacity of a Magistrate, and in that capacity he had authority to issue a summons, and on the party failing to attend, to issue a warrant for his arrest. No doubt this was the course adopted by the Magistrate who appears to have been guided by the provision of Chapter XV of the Criminal Procedure Code, a course inapplicable to offences under Act III. 1864, Bengal Council. The Magistrate appears to have acted under the provisions of Section 257 and issued a summons for the attendance of the petitioner, and, on the petitioner failing to attend, directed a warrant to be issued under the provisions of Section 260; but as Act III of 1864, Bengal Council, does not provide for the punishment of any offence

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committed under the Act by imprisonment even in lieu of fine, but by fine only, and points out in Section 80 how such fines are to be realized, *viz.*, as provided in Section 61 of the Criminal Procedure Code by distress and sale of moveable property, I think the proper course to have been taken when the party charged with an offence under the Act failed to attend upon summons, was, on his default, to proceed against him and impose a fine upon him, as provided by the law, and not by the issue of a warrant of arrest.

Under this view of the case, I think the order for the issue of the warrant must be quashed as illegal.

Mookerjee, J.—I am also of opinion that the order passed by the Magistrate and Commissioner of the Municipality of the Suburbs of Calcutta for the issue of a warrant of arrest against Bissessur Chatterjee must be quashed. Under Act III of 1864, Bengal Council, the Magistrate had no power or authority to issue a warrant for the arrest of a person who has failed to appear on a summons to answer a charge under Section 77 of that enactment for using certain premises as a straw or wood depôt without a license. The Section merely enacts that "no premises shall be newly used" as a straw depôt except under a license from the Municipal Commissioners, and that whoever uses such a depôt without a license shall be liable to a fine. Neither this Section, nor any other Section of this law, gives the Magistrate any power to compel the attendance of the party charged with having used premises as a straw depôt without a license. He may serve the person accused with a notice or a summons to answer the charge and show cause why he should not be fined, but I am clearly of opinion that he cannot be arrested under a warrant and his body produced before the Magistrate, as if he was a felon or had committed some heinous offence. The Legislature did not think it proper to arm the Commissioner or Magistrate with such powers in the cases specified in Section 77, or in the previous Sections of this enactment, where penalties are provided for not keeping drains in proper state, keeping sheep pen in a filthy state, &c. The Legislature has provided an ample remedy in these cases by empowering the Magistrates to inflict fines on proof of the charge that a person has committed a breach of any of the duties enjoined by this law. I agree in setting aside the order of the Magistrate as unauthorized and unwarranted by law.

The 7th June 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Autre-fois acquit—Criminal force—Hurt—Section 352, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Judicial Commissioner of Assam.

Kaptan *versus* G. M. Smith.

A person tried and acquitted on a charge of using criminal force under Section 352 (which includes the offence of battery) cannot be tried, in respect of the same criminal matter, on a charge of hurt.

Bayley, J.—Mr. Menzies Smith having been discharged on his trial for the offence of assault or use of criminal force under Section 352, which includes the offence of battery (*See* Morgan and Macpherson's Penal Code, page 308) cannot now be tried for causing "hurt." The criminal matter in respect of which Mr. Menzies Smith was tried was the flogging and beating of a Coolie with a cane, of this he was acquitted. It is now intended to put Mr. Menzies Smith on his trial for the same criminal matter upon a charge of causing "*hurt.*" It is quite clear under whatever denomination the offence is classed, it is the *one* offence of beating and flogging. A second trial for the same offence cannot be allowed to take place, regard being had to the provisions of Section 55 of the Code of Criminal Procedure.

In the case of the Queen *versus* Dwarka-Nath Dutt, 7, Weekly Reporter, 15, Criminal Rulings, Sir Barnes Peacock in his judgment discusses fully the plea of *autre-fois acquit;* and in page 19 His Lordship makes the following observation :—"When it is said "that the offences must be the same, it is "merely rmeant that they must be in ality "the same." It appears to us that the actual offence of which Mr. Smith was acquitted is the same as that for which he has been again indicted under the term "*hurt.*" Under these circumstances the plea of *autre-fois acquit* stands good, and the second trial should not take place.

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The 10th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

License—Slaughter-house—Offensive trades—Section 1 Act VII, B. C., of 1865—Section 77 Act III of 1864.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of* 24-*Pergunnahs.*

The Municipal Commissioners for the Suburbs of Calcutta, *Prosecutors*,

versus

Zamir Shaikh and others, *Opposite Party.*

The Advocate General instructed by Mr. Adkin for the Prosecutors.

Baboos Aushootosh Dhur and *Debender Chunder Ghose* for the Opposite party.

The words "uses any premises" in Section 77 Act III of 1864 mean using and employing the premises as a place for the carrying on of the offensive trades mentioned in that Section.

No person is liable to any penalty under Section 1 Act VII of 1865 except a person who without a licence uses a place or building as a slaughter-house either by letting it out for such purpose, or by employing servants and others for the purpose of killing cattle therein; but a person who may be the mere servant of a butcher killing cattle in a particular slaughter-house, or a butcher resorting accidentally or occasionally to a slaughter-house for the purpose of killing and killing an ox or sheep there, does not use the place as a slaughter-house within the meaning of Section 1 Act VII of 1865, B. C.

Norman, C. J.—In this case one Zamir and 18 other persons have been convicted by Moulvie Abdool Luteef, Khan Bahadoor, Municipal Commissioner and Deputy Magistrate of the 24-Pergunnahs, of having, on the 2nd of May 1871, used a place at Kurrya as a slaughter-house without a license, whereby they committed an offence under Section 1 Act VII of 1865, B. C.

The Court directed that Zamir and the others should pay a fine of 10 rupees each.

The evidence on which the conviction proceeded was that these prisoners were found on the day in question engaged in skinning, cleaning, and dressing the carcases of slaughtered sheep and goats.

The Deputy Magistrate says:—"I am perfectly satisfied that the accused persons have used the slaughter-house in question within the meaning of the Act, by skinning and dressing the carcases of newly slaughtered sheep at that slaughter-house, and that as they were aware that no license had been duly taken out for the use of that slaughter-house they have committed an offence under that Act."

The defence set up by eight of them was that they had been in the habit of working in that slaughter-house as butchers;—by three of them, that they went to the slaughter-house for the purpose of purchasing the heads and entrails of slaughtered sheep and cattle;—and by two of them, that they were coolies of butchers engaged in carrying meat from the slaughter-house to the market.

The pleader for the defendants contended that the persons found cleaning and skinning the carcases of slaughtered cattle were not shewn to have "*used*" the slaughter-house within the meaning of the word "used" as found in Section 1 Act VII of 1865, B. C.; that the person who uses a building or other place for the purposes of a slaughter-house is the only person required to take out a license; and the accused, who may have been mere labourers, are not shewn to have committed any offence.

The Magistrate expressed his opinion that "it is not necessary for every butcher or servant of a butcher to take out a separate license for using a slaughter-house by working in it, but it is necessary for every such person before he uses it to make himself sure that a license has been taken out from the proper authorities for its being so used."

The case has been sent up to this Court under Section 434 by the Judge of the 24-Pergunnahs, and the question which we have to consider is whether the conviction was legal. It turns upon the construction of Section 1 of Act VII of 1865, B. C., which provides that:—No place within the jurisdiction of the Municipal Commissioners of the Suburbs of the Town of Calcutta * * * shall be used as a slaughter-house unless a license in writing for the use thereof as a slaughter-house has been obtained from the Municipal Commissioners, who are empowered at their discretion, from time to time, to grant such license; and whoever, without such license, uses as a slaughter-house any place within the limits aforesaid, shall be liable to a penalty not exceeding two hundred rupees and to a penalty not exceeding fifty rupees for every day after the conviction for such offence during which the said offence is continued.

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We are of opinion that a person who may be the mere servant of a butcher, killing cattle in a particular slaughter-house, or a butcher resorting accidentally or occasionally to a slaughter-house for the purpose of killing, and killing an ox or sheep there, cannot be said to "*use the place* as a slaughter-house" within the meaning of Section 1. He may use a particular part of the place for the purpose of slaughtering his cattle there, but he does not use the house or place (that is the entire place) as a slaughter-house.

Now if Section 77 Act III of 1864 is referred to, some light will be thrown upon the sense in which the word "use" of premises is employed in these Acts. That Section enacts that "no premises shall be "newly *used*, except under license from the "Municipal Commissioners for any of the fol-"lowing purposes; namely, for melting tallow, "for boiling offal or blood, or as a soap house, "oil boiling house, dyeing house, tannery, "brick pottery, or limekiln, or other manu-"factory, or place of business from which "offensive or unwholesome smells arise, or "as a yard or depôt for hay, straw, wood, "or coal; and whoever, without a license, "*uses any such premises* for such purpose "shall be liable to a fine not exceeding two "hundred rupees, and a fine not exceeding "fifty rupees for every day after the con-"viction for such offence during which "the said offence is continued."

It is clear, therefore, that in Section 77 Act III of 1864 the words "uses any premises" mean using and employing the premises as a place for the carrying on the offensive trades mentioned in the Section.

The person using the premises is contemplated as a single individual—the person who carries on the business—and the offence of using the premises is treated as an offence in its nature continuous. In all the instances mentioned, the master and owner of the business, whether tallow-melter, soap boiler, dyer, tanner, or potter, is treated as the person using the premises. I think no one would construe Section 77 as imposing a penalty on the servants of such persons employed in any operations necessary for the purpose of carrying on the offensive trades mentioned therein.

To return to the words of Section 1 Act VII of 1865. The person who "uses" as a slaughter-house any place within the limits mentioned therein is liable to a penalty not exceeding rupees 200 *and also to a penalty* not exceeding rupees 50 *for every day after the conviction for such offence during which the said offence is continued.*

Now if a servant kills an animal in a particular corner of a building, he uses that particular spot for the purpose of doing what he is about, but he does not use the building or place in a small corner of which he is at work. His act, if an offence at all, is a single isolated offence incapable of continuation. If the act of killing be repeated in the case of each fresh animal killed, it is a fresh offence, and not a continuation of the former offence. Again, the person who "uses a place as a slaughter-house" is not only liable to a fine of Rs. 200 for such offence, but he is also liable to a fine of 50 Rs. for every day during which the offence is continued after conviction. If the killing of an ox or sheep by a servant is the *use* of the place in which the killing takes place, as a slaughter-house within the meaning of Section 77, as constituting part of an offence which is continued, if the Section is to be construed literally, it would appear that the servant so convicted wouldbe liable to the penalty for the continued use of the premises, although that use is not by himself, and although he might have no means of preventing such continued use. Again, the penalty is imposed on any person who *uses* a slaughter-house without a license, but there is nothing to show that the knowledge that no license has been taken out is any necessary ingredient of the offence. If the Legislature had intended that servants or butchers resorting to such places, unconnected with the ownership of the place, should be made liable to a penalty for killing cattle in an unlicensed slaughter-house, we should have found words to the following effect:—"Whosoever knowing that "no license has been taken out for the use of "the place as a slaughter-house uses it for "such a purpose shall be liable," &c.

I am therefore of opinion that no person is liable to any penalty under Section 1 except a person who uses a place or building as a slaughter-house either by letting it out for such purpose, or by employing servants and others for the purpose of killing cattle therein. No doubt if a number of butchers were to combine together and hire a slaughter-house for the purpose of carrying on business and slaughtering cattle there, at a weekly, monthly, or even daily rent, each and all of them might be punished.

In the present case the only fact found against the defendants is that they used the

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slaughter-house by skinning and dressing carcases of newly slaughtered cattle at that place. Though the Deputy Magistrate finds that they were aware that no license had been duly taken out for the use of the slaughter-house, that, as I have said, constitutes no part of the offence as defined by the Legislature.

I am of opinion that such a finding is not sufficient to support the conviction, which must be quashed, and the fines, if levied, must be refunded.

In the case of the defendant Ruheembuksh, however, who has pleaded guilty to the charge, the conviction and sentence will stand.

Loch, J.—It appears to me, looking at the terms of Section 1 Act VII of 1865, that the person required by the law to take out a license is either the owner or occupant of the premises used as a slaughter house, not persons who go there to kill animals or to have them killed; and the mere fact of a person going there, as the parties before us did, either as servant in the employment of the butcher or for the purpose of having an animal killed, does not make him liable to the penalty prescribed by the law because the owner or holder of such premises has not taken out a license. The Deputy Magistrate holds that though every individual who makes use of a slaughter-house for killing any animal is not required to take out a license, yet every such person is bound to ascertain whether the slaughter-house he uses has been licensed, and if he kill or have killed any animal in a slaughter-house for which no license has been taken out, he is liable to the penalty prescribed by Section 1 of the Act. But if this were intended, the wording of the law would surely have been different. The law says,—whoever without such license uses as a slaughter-house any place within the limits aforesaid shall be liable, &c. If the construction put on the law by the Deputy Magistrate were correct, we might expect to find words to this effect,—whoever uses as a slaughter-house any place for which no license has been taken out, or whoever knowing that a license has not been taken out uses as a slaughter-house, &c. The interpretation adopted by the Deputy Magistrate is opposed to the grammatical construction of the sentence, for that declares that the person who without having a license uses as a slaughter-house any place, &c., shall be liable. The words "whoever without such license" are not equivalent to "whoever knowing that a license has not been taken out for the slaughter-house." If, however, the Deputy Magistrate is correct, which I think he is, in saying that every person who makes use of a slaughter-house need not take out a license, then the words as used in the Act can apply only to the owners or occupants of the premises used as such. The proper construction to be put upon the words may be gathered from similar words used in Section 77 Act III. 1864, B. C., and there they evidently apply to the owner or occupier of the premises, and not to any person who may resort to them for the purposes of buying or selling or doing work as a servant.

I concur in the order passed by the Chief Justice.

The 13th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Nuisance—Noxious trade—Prescriptive right.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of 24-Pergunnahs.

The Municipal Commissioners of the Suburbs of Calcutta,

versus

Mahomed Ali and another.

The Advocate General for the Municipal Commissioners.

Mr. W. A. Montriou and *Baboo Ashootosh Dhur* for Mahomed Ali and another.

A previous sanction to the establishment of a trade does not entitle the proprietors to continue the business after it has become a public nuisance to the neighbourhood.

No one has a right to corrupt the air of a particular locality by the exercise of a noxious trade simply because at the commencement of the nuisance no person was in a position to be injured by it; and no prescriptive right can be acquired to maintain, and no length of enjoyment can legalize, a public nuisance involving actual danger to the health of the community.

Reference.—I HAVE the honor to submit for the orders of the High Court under Section 434 of the Criminal Procedure Code the record of a case in which the Joint Magistrate

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has ordered the proprietors to close a slaughter-house at Narkuldanga in the Suburbs of Calcutta.

It appears that the Magistrate of the District, having visited the slaughter-house on the 14th May, came to the conclusion that "the occupation of slaughtering cattle and sheep carried on in the slaughter-house at Narkuldanga is injurious to the health and comfort of the community, and that it should therefore be suppressed;" and he proceeded under Section 308 of the Criminal Procedure Code. The depositions recorded by Mr. Barton, the Joint Magistrate, to whom the case was referred, show that some persons who inspected the place observed, and that some persons who live in the vicinity have experienced, those evils which are inseparable from slaughter-houses. They show also that the place is not sufficiently supplied with fresh water and that the drainage of the locality has not been properly provided for. But they do not show that the slaughter-house in question is in a worse condition now than at any time since its establishment; on the contrary it seems that some improvement has been effected in the arrangements during the last few years.

It was urged before the Joint Magistrate that Section 308 is not applicable to the case because the slaughter-house was established in 1844 with the sanction of the Magistrate, which sanction was given after full enquiry and careful consideration; and because it has since been maintained with the express sanction of the law, and of the Municipality which now constitutes itself the complainant in the matter. But Mr. Barton did not understand the argument and rejected it on the ground that the past history of the slaughter-house did not exempt it from the operation of the law. Mr. Barton did not distinguish between the trade and the manner in which it is conducted. It cannot properly I think be said that a trade is injurious which has been established and maintained by authority and is expressly sanctioned by law; and it is, as it seems to me, especially absurd in the Municipality to set up such an allegation since they have erected a slaughter-house and are very anxious to establish the business. But one slaughter-house may be well-conducted and another ill-conducted, and it may be a very proper subject for Magisterial enquiry and interference if a slaughter-house is used without due care for cleanliness. Now, there are special laws which empower the Municipalty to enforce cleanliness; but instead of putting into effect these provisions which invest them with ample power for the purpose of avoiding what is injurious to the health and comfort of the community, they have adopted the expedient of treating the business as a public nuisance; and in this respect I think that the action of the Magistrate was illegal, and that the proceedings ought to be quashed.

From a copy of an order passed by me in a similar case in January 1870, I find that I expressed a similar opinion and upheld the order of the Deputy Magistrate refusing to treat this slaughter-house as a nuisance.

There seems to be an undefined idea that an unlicensed slaughter-house may be a nuisance, although one carried on under a license cannot be so treated. But the license does not alter the trade. And a general law cannot be applied to a case for which special laws provide. The Magistrate treats the slaughter-house as a nuisance, because he has failed to enforce the Slaughter-house Act of 1865. It has been pointed out to me that in the case of Elliottson *versus* Feelham to which the Joint Magistrate refers, and other cases, it is laid down that a person coming to reside in the vicinity of an offensive trade cannot set up his own right to untainted air, if the owner of the trade has acquired a presumptive right to carry it on; see Gale on Easements, page 291.

It appears to me that a considerable animus has been shown by the witnesses. The Health Officer refers to the slaughter of diseased cattle as if it afforded a reason for suppressing the slaughter-house; and those witnesses who confessedly live among gas-works, piggeries, and public latrines, do not hesitate to ascribe every noxious odour to the slaughter-house. This animus is referrible to the controversy which has been carried on for a considerable period and to the popular feeling which has been excited by paragraphs in newspapers and otherwise; and in submitting this case and others to the High Court I think that it will not be irrelevant if I mention shortly the facts which have come under my cognizance in various cases officially brought before me.

In 1865 the subject of the slaughter-houses attracted attention, and the Bengal Council passed Act VII of that year "for the better regulation and supervision" of them. It was proposed that a large and expensive slaughter-house should be built by the Calcutta Municipality for the use of the Town and Suburbs; and a private arrangement was made between the two Municipalities that the

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one in Calcutta should build the house, and that the one in the Suburbs should suppress all other slaughter-houses. The building was accordingly erected, and it is said to be very well adapted to the intended purpose. The Suburban Municipality therefore desire to fulfil their promise, but they have met with some resistance from those who have an important pecuniary interest in the old slaughter-houses; and the Calcutta Municipality being annoyed at the partial failure of the plan, pecuniarily and otherwise, have complained of breach of contract and have urged the Commissioners in the Suburbs to more strenuous efforts.

The object which these Commissioners have in view is doubtless good. There cannot be a slaughter-house without offal, blood, &c., and a very fetid effluvium; but there is nothing really noxious in all this, if the place is properly cleansed after the slaughtering; and a masonry building with masonry drains, kept under proper supervision, affords the best means of securing this object. But the goodness of the object does not justify a man in adopting unjust means for its attainment. The Legislature, it may be assumed, never intended that the Municipal Commissioners should avail themselves of the legal power entrusted to them to injure individuals for the sake of the public. It was not intended that they should arbitrarily suppress all slaughter-houses in order to force the public to resort to the Municipal slaughter-house; and they are not justified in refusing licenses to established slaughter-houses if they are properly conducted. But this is what they have endeavoured to do. As soon as the Act was passed the owners of slaughter-houses were required to go to a considerable expense in paving and draining them, and immediately afterwards they were told that their licenses would not be renewed. The slaughter-houses are very valuable property; and to refuse the owners a license is to destroy the property. It is no cause for wonder that the owners have sought to evade the law when they found that the Municipal Commissioners would not listen to reason or justice; and it is not surprising that they do not improve the slaughter-houses during the continuance of the contest in which they are endeavouring to obtain a license or compensation for the loss of the profits which the Municipality desires to appropriate. The owners are willing to give up their slaughter-houses for a fair compensation, but their proposals have been entirely rejected; and the Commissioners and Magistrates have sought to enforce compliance by criminal prosecutions which have hitherto failed. And now the Magistrate suddenly discovers that the slaughtering cattle is a public nuisance injurious to the health of the community, and desires the total suppression of it in four days. I am also informed that this measure has been adopted while a Committee appointed by Government is investigating the whole subject.

I think that the proceedings now before me are illegal and unjust; but I have no power to interfere, and I submit the record to the High Court with the recommendation that the order of the Joint Magistrate dated the 23rd ultimo directing that the slaughter-house be closed in four days should be quashed.

Judgment of the High Court:—

Norman, C. J.—On the 15th of May Mr. Graham, the Magistrate of the 24-Pergunnahs, visited a slaughter-house in the possession of Mahomed Ali and Moonshee Abbas Ali at Narkuldangah. He records that he found the place in a most filthy condition; that no arrangements appeared to exist for the removal of the offal and blood; that the stench was abominable and the ground saturated with blood and filth; that he was of opinion that the occupation of slaughtering cattle and sheep carried on in the slaughter-house at Narkuldangah was injurious to the health and comfort of the community, and that it should therefore be suppressed. He therefore ordered Mahomed Ali and Moonshee Abbas Ali within 7 days from the receipt of his order to suppress the occupation, or within that time to shew cause why the said order should not be enforced.

On the 23rd of May, the defendants having been duly summoned, Shaikh Ibrahim and Moonshee Abbas Ali by their pleaders appeared to show cause why the slaughter-house should not be suppressed.

Dr. Tonnerre being examined as a witness deposed that on entering the premises he found a place about 20 feet square made of masonry with a hole in the middle in which a gumla was sunk. On the masonry and inside the gumla was a large quantity of coagulated blood and dung mixed together. Several sheep and goats were lying on the ground with their throats cut. Near these were butchers skinning other sheep and goats. Going a little eastwards he came to a shed the road to which he describes as a mere compost of mud, offal, blood and cowdung. He entered the shed and found it full of freshly slaughtered cattle. The floor of the shed was of broken concrete full of holes. On

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both sides of the concrete was mud. Two-thirds of the breadth of the shed was concrete and remaining one-third mud consisting of offal and blood. Down the middle of the shed was a drain. In the drain was a quantity of stagnant blood. Parallel to the shed was a cutcha drain which received the sewage of the village south of the shambles and the blood and offal out of the gumla above mentioned. The drain was exceedingly filthy and there were large quantities of night soil in it. In the shed twenty-eight carcases of cows were suspended. The greater part of these cows were thoroughly diseased.

North of the first shed was another shed about the same size. In it about thirty six carcases of cattle were suspended more or less diseased. The floor was tiled but in bad repair. On the margin of the shed on each side and under was a mass of mud, offal and blood. The sewage drain above-mentioned runs parallel to this shed.

Dr. Tonnerre says the smell arising from the whole premises, the sheds, and the drain, was the most offensive and sickening smell he ever experienced. Between the canal and the sheds there is a large pond about four yards from the sheds. The drainage of the premises falls into this pond. The water of the pond was simply filthy sewage emitting a most sickening and offensive smell. On the north-west of the pond is a place where blood, offal, and cow-dung are thrown.

The slaughter-house is surrounded on all sides by human habitations.

Dr. Tonnerre says I consider the slaughter-house a most dangerous nuisance to the neighbourhood and liable to spread disease.

I consider the slaughter-house to have a tendency to spread small pox and cholera among people who live in its vicinity.

Dr. Tonnerre on cross-examination said he had known the slaughter-house for upwards of ten years; he visited it ten years ago. It was in a worse state then than it is now.

Mr. Hallan, a Veterinary Surgeon, the President of the Cattle Plague Commissioner, described the state of the slaughter-house and the accumulation of filth and offal. He speaks of the sickening stench and says it is likely to affect human life and health. He saw the livers and lungs of diseased animals which had been slaughtered and says that the consumption of the meat of these animals would be dangerous to human life; that the place could not be used as a slaughter-house without being injurious to the health of the neighbourhood, as there were no means to keep the premises in a clean state. There was no supply of clean water on the premises and no attempt at proper drainage.

Mr. James Blackburn, the Engineer of the Gas Company, said that he and others were frequently annoyed by most disgusting smells from the slaughter-house; that he had suffered in health, but could not swear that the smells from the slaughter-house were the cause of it. The effect produced by the smell is a sickening sensation which is worst in passing the place, but he had frequently felt it in his own house which is 400 yards to the south of the slaughter-house.

Jonathan Rist, an Engine-driver, who lives about 500 yards from the slaughter-house, speaks of the sickening smell which had compelled him to leave his food. He speaks of having often felt the sickening smell in the train when coming home.

Shaik Hadoo, a sirdar of coolies, who lives close to the slaughter-house, says that his children and wife are often made ill by the stink which comes from the slaughter-house. He himself is sometimes made ill. His son and brother died of cholera. Many of his neighbours are made ill. They cannot eat. They vomit.

On cross-examination he said that he was one of 500 or 600 persons who lived near who complained of the nuisance about a year ago; but the Deputy Magistrate at Sealdah, Kumar Harendra Krishna, dismissed the case.

Kedar Nath Ghose, a contractor, lives about 300 yards from the shambles. He says an awful stink comes from the slaughter-house after 4 o'clock. "Sometimes myself and "family are sick from it. We get vomiting "sickness, head-aches and fever. There is a "great deal of sickness among the people who "live near it. Many are leaving the place "altogether." On cross-examination he said he also complained of the nuisance last year with all the inhabitants, Hindoo and Mahomedan, of the place.

Meerun Khan, a khansamah, gave similar evidence.

The Joint Magistrate, Mr. Barton, says:— "The evidence of Drs. Tonnerre and Hallan, of "Mr. Blackburn and the others who speak of "the present state of the slaughter-house, is

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"clear and decisive. It shows beyond a "doubt that the nuisance is a public one "and of a most dangerous character, highly "injurious to the health and comfort of the "community." He adds:—"I visited the "place last Saturday and the abominations "of it exceeded every thing I had seen in all "my life."

The Joint Magistrate found the slaughter-house at Narkuldangah to be injurious to the health and comfort of the community.

The defendants declined to apply for an order that a Jury should be appointed to try whether the order was reasonable and proper.

The Joint Magistrate then ordered that the slaughter-house should be closed on or before the 27th of May.

The Judge of the 24-Pergunnahs being of opinion that the Magistrate's order was contrary to law, has referred the proceedings to this Court under the provisions of Section 434 of the Code of Criminal Procedure.

Mr. Montriou and Baboo Ashootosh Dhur contended that the order was illegal and should be quashed.

They contended that this slaughter-house had been established in 1844 with the sanction of Mr. Mytton, the Magistrate of the 24-Pergunnahs. It seems that this order was passed after a careful enquiry whether the business of a slaughter-house could be carried on at the place in question without inconvenience to any one, and that the Magistrate after personal inspection was satisfied with the arrangements then made.

They referred to Act XXI of 1857 and contended that Section 45, which provided that no place which was not used as a slaughter-house at the time of the passing of that Act should be so used without a license from the Magistrate, must be treated as having impliedly sanctioned the continued use of then existing slaughter-house. They contended that a slaughter-house is not in itself a public nuisance and they contended that the Municipal Commissioners under Section 3 of Act VII of 1865 of the Bengal Council ought to have compelled the defendants to remedy the defects in the slaughter-house by paving it, draining it, and causing a proper supply of water to be provided; that the Commissioners ought to have proceeded under that Act, and they could not treat the trade itself as a nuisance merely because it had been carried on without due precautions to avoid creating annoyance; that the carrying on of a trade which had been legalized and sanctioned by public authority and carried on in the same place for so many years could not be treated as a nuisance in a neighbourhood where other offensive matters, such as public tatties, pigsties, and bone heaps, which the evidence shews to have existed in the neighbourhood of the slaughter-house in question, had long been borne with; and on this point they referred to Russell on Crimes, Volume I, page 319, 3rd Edition.

The Advocate General appeared in support of the order of the Magistrate.

On reading through the evidence we think that there can be no question that the Joint Magistrate was abundantly justified in finding that the trade as carried on in the slaughter-house in question was most injurious to the health and comfort of the community. It was no answer whatever to say that the business was one which, if proper precautions had been taken by the defendants, might have been carried on without danger to the public health.

The permission by Mr. Mytton shews no more than that with reference to the state of the locality at the time when such license was granted and the arrangements then made, the business could then have been carried on without causing any nuisance to the persons residing in the vicinity.

As observed by Lord Tenterden in a case somewhat similar to the present, Rex *versus* Cross, 2 C. and P., 484, the license would not entitle the defendant to continue the business one hour after it became a public nuisance to the neighbourhood. Although the Commissioners had taken no steps under Act VII of 1865 against the defendants, the defendants had ample warning to set their house in order by the prosecution instituted against them by many hundreds of their neighbours in the course of last year.

We now come to the point adverted to by the Judge in sending up the case, *viz.*, that the evidence did not shew that the slaughter-house is now in a worse condition than at any time since its establishment; but on the contrary, that some improvement has been effected during the last few years, and that a person coming to reside in the vicinity of an offensive trade cannot set up his own right to untainted air if the owner of the trade has acquired a prescriptive right to carry it on.

The notion of the existence of a species of right to corrupt the air of a particular locality by the exercise of a noxious trade, provided that at the commencement of the nuisance

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no person was in a position to be injured by it, has been exploded. It seems convenient that we should refer to two recent decisions on the subject of trades carried on so as to create serious nuisances.

In the St. Helens Smelting Company *versus* Tipping, in the House of Lords, 35 Law Journal, Queen's Bench, p. 67, extensive operations for the smelting of copper were carried on in the neighbourhood of the plaintiff's property. The vapours exhaling from the works did great injury to the trees and shrubs on the plaintiff's estate. It was shewn that the whole neighbourhood where the copper smelting works were carried on was more or less devoted to manufacturing purposes, and it was argued that inasmuch as the copper smelting was carried on in a fit place, it might be carried on with impunity. The Judge at Nisi Prius had told the Jury that if a man by the erection of a limekiln or copper works or any works of that description sends over his neighbour's land that which is noxious and hurtful to an extent which sensibly diminishes the value of the property or the comfort of existence on the property, it is an actionable injury.

The House of Lords considered this direction substantially right.

The Lord Chancellor pointed out the distinction between cases where the thing alleged to be a nuisance is productive of mere personal discomfort, and those where the nuisance produces material injury to property. He pointed out that in the latter case the submission required from persons living in society to that amount of personal discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is a sensible injury to the value of property.

It was argued that sensible discomfort for carrying on a necessary trade in a suitable locality is not an actionable injury. Lord Westbury pointed out that the law as laid down on that subject unquestionably does not carry with it the consequence that a trade might be carried on so as to cause injury and destruction to neighbouring property. The case is stronger where the nuisance is one not merely injurious to property but dangerous to health.

In the Stockport Waterworks Company *versus* Potter, which is reported in 7 Hurlstone and Norman, p. 160, the nuisance consisted in the discharge into a brook of dye stuff containing arsenic, the effect of which was that in the reservoir of the Stockport Waterworks eleven miles below the defendant's works arsenic was found in the proportion of nearly 5 grains to one pound weight of mud. It was contended that the defendant's trade was carried on in a proper place and in a proper manner.

The Chief Baron in the course of the argument observed that his impression was that if a person carries on a noxious trade in a particular place to which the exigencies of society cause a town to extend, the assent of the growing population to the nuisance must not be presumed. Baron Martin, in giving judgment, observed :—" The defendants " carried on the trade for their own pro- " fit, and the public are benefitted by the " carrying on of all trades, but what answer " is that to persons whose water for drinking " is affected by arsenic poured into it by per- " sons carrying on such a trade ?"

As to the claim of a prescriptive right alluded to by the learned Judge, we may observe that no prescriptive right to maintain the slaughter-house in its present condition was set up before the Joint Magistrate, nor could any such right have been effectually asserted ;

First.—Because it appears on the evidence that the slaughter-house has existed in its present position only for about six, or at most ten years ;

Secondly.—There is no evidence that even during the whole of that time the place was used in the same manner and the stenches emitted to the same extent as at present;

Thirdly.—In our opinion it is clear that no length of enjoyment can legalize a public nuisance*(a)* involving actual danger to the health of the community.

(a) See Rex *versus* Hornby, 7 East, 199 ; Rex *versus* Cross, 3 Campbell, 227.

The Judge is wrong in supposing that it was incumbent on the prosecution to show that the slaughter-house was in a worse condition than formerly. The prosecution proved that the slaughter-house was in such a condition as to make it a nuisance dangerous to health, and if there was or could be any justification for its maintenance in such a condition it was for the defendants to show that by way of answer.

We are of opinion that the order of the Joint Magistrate was a legal and proper order.

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The 16th June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Sentence—Repealed Law —Act III of 1857—Act I of 1871.

Reference to the High Court under Secioon 434 of the Code of Criminal Procedure by the Officiating Magistrate of Burdwan.

Mohesh Nath *versus* Hurro Mohun Ghosal.

Where a prisoner was properly convicted on the evidence of illegally seizing cattle, but was sentenced under the old law (Act III of 1857) when that Act had been repealed by Act I of 1871, the High Court declined to interfere with the sentence, as the latter Act was in force at the time of the conviction and sentence, and no injustice had been done.

Reference.—On the 18th February the Joint Magistrate of Culna convicted the accused Hurro Mohun Ghosal of illegally seizing certain cattle, and sentenced him under Section 14 Act III of 1857 to pay a fine of 40 rupees and in default one week's imprisonment. The fine was paid. As the illegal seizure took place on the 6th February 1871, and Act III of 1857 ceased to be in force on the 13th January 1871 in consequence of the passing on that date of Act I of 1871, the above order appears to me to have been contrary to law. Section 24 of Act I of 1871 re-enacts the provisions of Section 14 of Act III of 1857, and the accused should have been punished under that Section.

Judgment of the High Court :—

Glover, J.—We do not think it necessary to interfere in this matter. No doubt the Magistrate is right in his finding that the offence was punished under the wrong Act; but as, at the time the offence was committed, Act I of 1871, which re-enacted the old law, was in force, there has been no injustice done, it not having been asserted that the conviction was not justified by the evidence.

The 15th June 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Exposure of children—Section 317, Penal Code.

Revision of proceedings in the case of Felani Hariani, *Prisoner.*

Section 317 of the Penal Code was intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner that the children not being able to take care of themselves may run the risk of dying or being injured.

Paul, J.—In this case the offence described in Section 317 of the Penal Code does not appear to us to have been committed by the prisoner. It is evident that the prisoner did not *expose* or *leave her children in any place* with the intention of wholly abandoning them. It is recorded by the Sessions Judge that "there is a decided presumption that "the prisoner's husband did not treat her "very well;" and it would appear that in consequence of ill-treatment, the prisoner ran away from her home, leaving behind her her two children, and her husband and mother to take care of them. Prisoner's conduct viewed in this light does not come within the operation of the crime defined in Section 317.

The real object of Section 317 is the prevention of abandonment or desertion by a parent of his or her children of tender years in such a manner that children not being able to take care of themselves, may run the risk of dying or being injured. The Section implies that children left without any protection are the objects of its provision. In the present case, the children were not only not left without protection, but left under the care and protection of their grandmother and father. Under these circumstances, it appears to us that the prisoner has been wrongly convicted and that she should be released. We order her release accordingly.

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The 17th June 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Breach of the Peace—Local enquiry—Statements not on oath—Section 318, Code of Criminal Procedure.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Rungpore.*

The Government

versus

Kali Chundro Shah, 1*st Party*, and Mohima Runjun Roy Chowdhry, 2*nd Party*.

Baboo Kashee Nauth Sein for the 1st Party.

Baboo Krishna Dyal Roy for the 2nd Party.

A mere local enquiry and statements of parties not on oath are not sufficient data on which a Magistrate can decide under Section 318 of the Code of Criminal Procedure, what party is in possession of land with regard to which a breach of the peace is apprehended.

Paul, J.—In this reference two questions have been submitted for our consideration:—1st, before a case can be brought under Section 318, is it necessary to adjudicate upon legal evidence; and 2nd, having been so brought, are the statements of the parties and mere local enquiry, *not on oath*, sufficient data on which to decide who is in possession of the disputed lands?

With reference to the first question, the Officiating Magistrate, Mr. Millett, has considered the decisions under Section 318 of the Criminal Procedure Code to be apparently conflicting. We think the circumstances of this case do not admit of any reference to those decisions which are said to be conflicting, because we find that in this case a petition was presented by Sheikh Burra Mahomed on the 10th January 1870; that his evidence was then and there taken on solemn affirmation, and he substantiated the principal matters contained in his statement. This evidence plainly shows that a dispute existed concerning lands, &c., which was likely to create a breach of the peace; and the order that was made on that occasion was to the effect that in order to prevent the breach of the peace, two Inspectors should be deputed to the spot to keep the peace. All the subsequent proceedings are based upon this preliminary proceeding. The subsequent proceedings consist of petitions and other matters put in by the disputing parties, and they clearly confirm the view originally taken by the Magistrate upon the evidence of Sheikh Burra Mahomed as to the existence of a dispute concerning lands, &c., which was likely to create a breach of the peace. Under these circumstances, it appears that the Magistrate was reasonably and rightly satisfied and that he acted fully within the provisions of Section 118. In this view of the case, a consideration of what is said to be a conflict between the various decisions is not, I think, called for; and I would suggest that in making references to this Court the Magistrates should be careful to glean the facts first, and see if any of the admitted facts on being carefully weighed and considered give rise to any questions which are mooted in the decisions said to be conflicting. In this case, we consider that if the Magistrate had applied his mind to the particular facts of the case, he would have had no difficulty whatever in putting the correct interpretation upon Section 318. It often happens that a confusion arises in the mind upon reading a number of decisions without at the same time assiduously considering the particular facts upon which those decisions are come to.

With reference to the second question, it is quite clear that mere local enquiry and statements of parties not on oath are not sufficient data on which to decide what party is in possession of land. We do not find on the records of this case any evidence of witnesses examined on oath by the Magistrate, and we consider that any statements that they may have made not upon oath cannot be regarded as evidence and ought not to be relied upon as such. It is admitted on both sides that there is no evidence of parties on the record, that the statements were not taken on oath, and that the local enquiry was not conducted on oath. Under such circumstances the question involved in this reference is too elementary to require discussion, and it has taken me by surprise that an enquiry made on the spot either in the presence or absence of the parties and some statements elicited from persons not under the sanction of an oath should be considered as any legal evidence on which to direct a party to be kept in possession to the exclusion of another. When we consider that an award under Section 318

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gives a man a strong hold upon land from which he cannot be dispossessed until the opposite party can prove a superior title, it cannot but be maintained that the proper proceeding must be that the local enquiry or investigation of whatever nature it may consist of should be upon evidence in the legal sense of the word. I do not myself much approve of the term *legal evidence;* for all that Courts of justice are concerned with is evidence in the legal sense of the term; that is, that which is taken on oath. Oral evidence is the statement of a witness on oath, and unless it be upon oath it cannot be any evidence at all. Therefore the word "legal" evidence seems to create some confusion, in that it supposes that there may be evidence which is not legal. The adjudication in any case must be upon evidence properly so called. The adjudication by the Magistrate on the second question having been made upon matter which was not properly in evidence is manifestly wrong and his proceedings must therefore be quashed.

Bayley, J.—On the first of the two questions referred by the Magistrate, I think there is no doubt that Sheikh Burra Mahomed's statement on solemn affirmation recorded by the Joint Magistrate, after the presentation of his petition, on its back and followed by an order endorsed under the affirmation upon the Police to act and for two constables to keep the peace, fully satisfied the Joint Magistrate as to the likelihood of a breach of the peace, and this in such a manner as to make his proceedings in accordance with the provisions of Section 318. It follows, therefore, that a discussion of the several decisions referred to by the Magistrate is now unnecessary in this case and under the above circumstances.

As to the second question, the pleader is unable to show us any statement on oath or solemn affirmation of any witness whatever. In fact, it seems clear that the Joint Magistrate went to the village in company with his mohurrir and asked the inhabitants their views of the rights and interests of the contending parties, but did not put their statements under the sanction of an oath or solemn affirmation. So these statements under the law are no evidence at all. The Joint Magistrate, no doubt, makes some reference as to "oral" evidence in his judgment, but as stated above there is no such evidence in a legal sense on the record. I concur, therefore, in the order that the Joint Magistrate's proceedings should be quashed as illegal on the second point referred.

The 17th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Procedure—Witnesses—Sections 227 and 228, Code of Criminal Procedure.

Committed by the Magistrate and tried by the Sessions Judge of Tipperah on a charge of Forgery.

The Queen *versus* Rajcoomar Mookerjee, *Appellant.*

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Appellant.

Where a prisoner, under Section 227 Code of Criminal Procedure, gives in a list of the witnesses he wishes to summon, after his case has been committed, the Magistrate is bound to exercise his discretion upon the point, and to state whether he will summon the witnesses or not, and he ought to state his reasons for not doing so. If he thinks the witnesses were included in the list for the purpose of delay, he should proceed under Section 228 of the Code.

Jackson, J.—The point which has been taken before us on appeal in this case is that the prisoner's witnesses whom he cited on the 10th April have never been sent for or examined. The Judge states that as they were called only to prove enmity, he did not think it necessary to send for them, inasmuch as there was evidence of that enmity already. It is insisted before us that the defendant is entitled to have these witnesses examined; that there is nothing upon the record here to show that these witnesses were cited solely to prove enmity. It is possible that they may also prove other facts in favor of the prisoner. We think it is most unsatisfactory that the prisoner should be convicted and sentenced without having the opportunity of examining the witnesses whom he cited for his defence. Under Section 227 of the Criminal Procedure Code the prisoner is required at once upon the commitment to give in orally or in writing a list of witnesses whom he may wish to be summoned to give evidence on his trial before the Court of Session. At that time the vakeels for the prisoner stated that they were not in a position to give in the

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list of their witnesses and asked for time to do so. On the 29th March two days' time were allowed. On the 10th April the prisoner's vakeels put in their list of witnesses before the Sessions Judge. They stated to the Sessions Judge that they had already put in this list of witnesses before the Magistrate and the Magistrate had returned the petition. They stated that as the 2nd May was fixed for the trial there was ample time for summoning these witnesses, therefore they asked that they might be summoned. The Sessions Judge passed no order upon the subject, but stated that at the trial necessary orders will be passed. His proper order on the petition was to require the Magistrate to have passed orders upon it. The law says that "it shall "be in the discretion of the Magistrate to "allow the accused person to give in any "further list of witnesses at a subsequent "time. The Magistrate shall receive the list "and summon the witnesses to appear before "the Court before which the accused person "is to be tried."

It was incumbent upon the Magistrate to exercise his discretion upon the point. By returning the list and passing no order upon it he acted illegally. He was bound distinctly to state whether he would summon the witnesses or not, and he ought to state his reasons for not doing so. He should consider the reasons given by the accused for the delay in giving the list, and whether they were sufficient or not. One reason in this case appears to be connected with the receipts, copies of which he had applied for, which were in the charge against him, and copies of which were not furnished to him until the 6th April. He put in his list of witnesses at some time between the 6th April and 10th April. It seems to us that if this is the case there was no very great delay on his part. But under any circumstances it is always most unsatisfactory that a person who is charged with any criminal offence should be convicted and sentenced without hearing the evidence which he wishes to adduce in his own behalf. If the Magistrate was of opinion that the witnesses were included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate ought to have proceeded under Section 228.

We remand this case for the present to the Sessions Judge with directions that he would direct the Magistrate to send for the defendant's witnesses, and that he will examine them and return the record to this Court with his opinion as to the effect of their evidence.

The 19th June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mooktear—Suspension or dismissal —Procedure—Charge—Sections 15 and 16 Act XX of 1865.

Golab Khan, Mooktear, *Petitioner.*

Mr. S. Vertannes for the Petitioner.

The procedure under Section 16 of the Pleaders' and Mooktears' Act, 1865, refers only to cases of professional misconduct, but the words "any such misconduct as aforesaid" being connected with the words "grossly improper conduct in the discharge of his professional duty."

A Mooktear may be suspended or dismissed for any reasonable cause, the words "for any other reasonable cause" in Section 15 referring to cases of other than professional misconduct.

When a Mooktear is alleged to have committed some impropriety for which he could not be criminally prosecuted and which does not come under the denomination of professional misconduct, the High Court may institute enquiries *suo motu*, and if it thinks that any reasonable cause other than professional has been established, may suspend or dismiss the Mooktear without the necessity of either written charge or notice, so long as the Mooktear had every facility for knowing what he was charged with and for making his answer.

Glover, J.—Golab Khan was tried at the Midnapore Sessions on a charge of instigating a very serious Dacoity. He was acquitted (the Judge differing from the assessors who thought the accused guilty) on account of an insufficiency of evidence which induced the Judge to give him the benefit of a doubt.

The Magistrate considered that, although acquitted at the Sessions, Golab Khan was under the circumstances unfit to hold the position of Mooktear and applied to the Judge under Section 16 of Act XX of 1865 to report the matter to the High Court. The Judge, Mr. Bainbridge, (the same officer who held the Sessions trial), sent up the Magistrate's letter with an endorsement to the effect that the Mooktear deserved to lose his sunnud.

This Court, after reading the proceedings, pointed out to the Judge that the requirements of the law had not been complied with;* and the papers were returned with directions that a charge should be properly drawn up and a copy of the same with notice of the day fixed for considering it should be sent to

* 15 W. R., Civil Rulings, p. 171.

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Golab Khan. These directions have been carried out, and the Magistrate again recommends that Golab Khan be dismissed from his office of Mooktear. The Officiating Judge, Mr. Cornell, has however declined to support the Magistrate's proposition, holding that the Mooktear has been sentenced to dismissal on account of an offence of which he has already been acquitted by a competent Court, and that, in any case, the misconduct contemplated in Section 16 of the Pleaders' Act is professional misconduct of which Golab Khan is not even alleged to have been guilty.

After hearing counsel for the petitioner, I am disposed to think that the procedure under Section 16 of the Act does refer only to cases of professional misconduct; the words used "any such misconduct as aforesaid" being connected with the words "grossly improper conduct in the discharge of his professional duty" used in Section 15—and as the misconduct which the Magistrate considers proved against Golab Khan is not alleged to be "professional" misconduct, I think that so far the Officiating Sessions Judge was right.

But I do not concur in the other part of his opinion. It seems to me that the words "for any other reasonable cause," used in the last Clause of Section 15 refer to cases of other than professional misconduct, and that if such reasonable cause is shown, a Mooktear may be suspended or dismissed notwithstanding that he have committed no act of professional misconduct. If it were not so, it is difficult to see with what intention the Legislature added the words above quoted to the Section.

Now, in the Dacoity case, Golab Khan was acquitted against the opinions of the assessors. The Judge himself did not seem to have any moral doubt of his guilt; for after detailing the reasons which induced him to think the evidence insufficient, he says "at the same time I think the strongest suspicion attaches to him, and possibly simply as a matter of justice, the assessors may be right."

I was one of the Judges who heard the Dacoity case in appeal to the High Court, and I thought at the time that the assessors were right and that there was sufficient evidence to convict Golab Khan. No doubt he was acquitted and cannot be harassed again on the same charge; but when the Law says that a Mooktear may be dismissed by the High Court for any "reasonable cause," we may, I think, look if necessary behind a verdict of acquittal, and see if the circumstances under which that acquittal was come to, do not, except as regards a fresh trial, practically annul any such declaration of Golab Khan's innocence as a verdict of not guilty might ordinarily be supposed to give. We ought to treat his case, I think, as a matter of equity and good conscience, and ought not to be bound to consider him a blameless man, quoad Section 15 Act XX of 1865, merely because he has been released under very peculiar circumstances from a criminal charge.

After carefully considering the evidence brought against Golab Khan in the Dacoity case, I cannot agree in the propriety of the verdict of acquittal. I think it proved that he did instigate the attack on the Ranee's premises, and that is, I consider, a very sufficient and reasonable cause for his dismissal from the office of Mooktear.

I say the evidence "in the Dacoity case" because, as I have before stated, I do not think that the question now raised comes under Section 16 of the Act at all, and the charge and notice appear to me to have been unnecessary. When I joined in the order directing the Magistrate to proceed under Section 16, I was under the impression that that Section governed the matter. Further consideration has made me think differently.

It seems to me that when a Mooktear is alleged to have committed some impropriety (short of an offence for which he could be prosecuted criminally and if convicted dismissed from office under Section 14 of the Act) which does not come under the denomination of professional misconduct, the High Court may institute enquiries *suo motu* and if it thinks that "any reasonable cause" other than professional has been established, may suspend or dismiss the Mooktear without the necessity of either written charge or notice. Of course, it would take care that the Mooktear had every facility for knowing what he was charged with and for making his answer, but no formal charge, as under Section 16, would appear to me to be necessary.

In this case Golab Khan has had every opportunity.

Kemp, J.—I have again read the evidence in the Dacoity case against Golab Khan. I concur with the assessors and think that there is evidence which clearly established that Golab Khan took an active part in instigating the Dacoity on the Ranee's cutcherry. I am of opinion that Golab Khan is not a proper person to practise as a Mooktear, and I concur with Mr. Justice Glover in directing that the name of Golab Khan be struck off the roll of Mooktears.

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The 23rd June 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Police Report—Evidence—Breach of the peace—Section 318, Code of Criminal Procedure.

(Criminal Motion.)

Bhudressory Chowdhranee, *Petitioner,*

versus

Goburdhun Majhee on behalf of Roy Pertab Chunder Burrooah, *Opposite Party.*

Baboo Mohinee Mohun Roy for the Petitioner.

Mr. R. T. Allan and *Baboo Tarinee Kant Bhuttacharjee* for the Opposite Party.

The report of the Police is not evidence and ought not to be accepted as sufficient to institute proceedings under Section 318 of the Code of Criminal Procedure.

Bayley, J.—We think this rule should be made absolute, and the order of the Extra Assistant Commissioner set aside.

The contention between the parties was as to the right of fishery, and the legal question raised before us in this reference is whether the Extra Assistant Commissioner had legal evidence to proceed upon under Section 318.

It is admitted that no depositions on oath were taken, and it is not alleged that the Magistrate personally and with his own eyes saw any probability of a breach of the peace. All that was acted upon was the report of the Police.

In a recent case decided by Mr. Justice Paul and myself on the 17th of this month,* we stated on a similar question that "mere "local enquiry and statements of parties not "on oath are not sufficient data on which to "decide what party is in possession of land," and further on, that "any statements made "not on oath cannot be regarded as evidence "and ought not to be relied upon as such.." The only exception to this rule, if exception it can properly be called, is when a Magistrate on the spot and with his own eyes sees parties armed for a conflict or otherwise in such a position as would create a breach of the peace.

A decision of Mr. Justice L. S. Jackson and Mr. Justice Markby, dated the 6th April 1869,* has been quoted to us as holding that in some cases the mere information of the Police may be accepted. There might have been peculiar facts in that case which are not in this. The majority of decisions are the other way. So we follow them, and the ordinary rule of law, *viz.*, that statements not upon oath are not ordinarily legal evidence.

It has, however, been pressed on us that the complainant himself, Neel Chand Majhee, had requested by a petition that the Magistrate should proceed under Section 318, but on referring to the petition and the endorsement upon it, it is quite clear that all that the complainant had requested was with a view to the satisfaction of his own particular claim and did not specifically ask for an enquiry and trial under Section 318.

In this view we think that the orders of the Assistant Extra Commissioner, dated the 26th May 1870 and 24th November 1870, must be set aside, and this rule made absolute.

Mitter, J.—I am of the same opinion. The report of the Police is no evidence whatever, and the Extra Assistant Commissioner ought not therefore to have accepted that report as sufficient to institute proceedings under Section 318.

The 1st July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Theft—Fine—Punishment—Section 380, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

Sheikh Dulloo

versus

Zainah Bebee and others.

* *Ante*, p. 13.

* 11 W. R., *Crim.*, p. 36.

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On a conviction for theft in a dwelling under Section 380 of the Penal Code, fine cannot be substituted in lieu of imprisonment, though it may be added to imprisonment.

Reference.—A CHARGE of theft in a dwelling house having been brought against certain women, residents of Cashmir, they were tried by the Magistrate under Section 380 of the Penal Code. On the evidence the Magistrate found them guilty under the above Section, and sentenced them to pay a fine of rupees 500 or in default to suffer 6 months' rigorous imprisonment.

On conviction under Section 380, the punishment must be imprisonment of either description, and fine *may be added;* but no option is given of substituting fine in lieu of imprisonment, and the sentence therefore appears to me to be an illegal one which should be quashed.

I find myself unable to deal with the case although it has come before me in appeal, for the defendants have paid the fine and have gone out of the jurisdiction of this Court. There is evidence to show that they did commit the theft, and I cannot therefore say that the finding was a wrong one, but the sentence being illegal I am equally unable to confirm it.

As the male relatives of the appellants are waiting here for the disposal of the case, I have at once referred the matter for the order of the High Court without calling for any explanation from the Magistrate.

Judgment of the High Court.

Kemp, J.—Under the circumstances stated by the Sessions Judge, the order of the Magistrate must be set aside as illegal. The fines must be returned to the parties or their representatives. The Magistrate must take such steps as he may deem proper for the re-arrest of the accused, and for passing a legal sentence under Section 380 of the Penal Code.

The 11th July 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Procedure—Complaint—Theft.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.

Runnoo Singh *versus* Kali Churn Misser and others.

Evidence in support of a complaint must be taken and considered before a Magistrate can dismiss the complaint. A mere plea by an accused that the property of the theft of which he is charged is his own property, unsupported by proof or by some circumstances which tend to indicate that there is some truth in the statement, is not sufficient to entitle him to be summarily discharged.

Reference.—IN this case Runnoo Singh, complainant, complained against Kali Churn Misser and others of plundering the crops said to have been gathered in his field by the complainant who loaded them on carts. The complainant said that he was a tenant of one Khosalee Ram, the landlord; that he had grown the crops on obtaining a settlement from the zemindar's tuhseeldar, and that the land was previously held by Sham Lal who had relinquished it.

The principal defendant, on being examined, said that the land of which the crops are said to have been carried away was the jageer of Sham Das Gosain who had leased it to him and that he had cultivated the crops. After recording the statement the Joint Magistrate ordered an enquiry by the Police on the 4th May 1871.

The Police submitted their report to the effect that the crops belonged to complainant and that they had not been cultivated by the principal accused party Kali Churn. The Joint Magistrate on the 10th, without hearing any evidence in support of the complainant, struck it off with reference to the ruling of the High Court in the case of Queen *versus* Ram Churn Singh, dated 15th April 1867.

It appears to me that the order of the Joint Magistrate, passed after recording the statement of the complainant only, is clearly erroneous.

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The defendant, by the said complainant's account, alleges a right to the crops taken by him, and the Joint Magistrate, on the strength of the precedent quoted by him, refuses to inquire further into the case. There can be no doubt that the meaning of the said precedent has been misunderstood by him, as clearly appears from the case of Nundoo Chowdhry, decided on the 25th March 1871.

Judgment of the High Court.

Paul, J.—Read the letter of the Sessions Judge of Bhaugulpore, No. 102S., dated the 30th June last.

The High Court observe that the view taken by the Judge is clearly right, and the dismissal of the complaint on the grounds stated by the Joint Magistrate must be set aside. The Joint Magistrate must try the case according to the allegations of the parties and form his own opinion on the case, unaided by any such local enquiry by a Police Officer as he in one stage of the case directed. The Police may make a map of the locality if that should be deemed necessary. If the Magistrate finds on duly taking and considering the evidence to be adduced by the complainant that he has made out his statements which go to shew that the accused has committed theft, he should call upon the accused for his defence. If the accused should prove that the allegations of the complainant are not to be relied on and that the crop was his, of course he will be entitled to an acquittal. If the accused should fail in doing so, but should shew that the ownership of the crops is a matter of *bonâ fide* dispute between himself and the complainant, he will be entitled to be released. The parties will then be left to settle their disputes in a civil suit, as the nature of the case will be altered from a criminal charge to an action for damages. A mere plea by the accused that the property of the theft of which he is charged is his own property, unsupported by proof or by some circumstances which tend to indicate that there is some truth in the statement, is not sufficient to entitle him to be summarily discharged. If the accused fails to shew that the alleged stolen property is his, but proves that he in *good faith* believing the property belonging to the complainant to be his, took that property out of the complainant's possession, then in such a case the dishonest intention being absent, the person accused will not be guilty of theft,—see illustration (*p*) in Section 378 of the Penal Code, and also Morgan and Macpherson's work, page 339.

The 11th July 1871.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Procedure—Jury—High Court.

The Queen *versus* Rutton Dass and Doorga Dass, *Appellants.*

Committed by the Magistrate and tried by the Sessions Judge of Moorshedabad, on a charge of dishonestly receiving stolen property with guilty knowledge.

A Jury may be satisfied with a minimum of proof, and it is beyond the power of the High Court in such cases to interfere with its verdict; but when there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot, under such circumstances, be sustained.

Ainslie, J.—The prisoners, Doorga Dass and Rutton Dass, who have appealed to this Court, were convicted by a Jury under Section 411 of the Indian Penal Code. The former made certain statements before the Magistrate which were read as evidence for the prosecution. The Jury seem to have placed full reliance on these statements notwithstanding the remarks of the Sessions Judge suggesting doubts in respect of them. The examination before the Magistrate was evidence which could legally be used in support of the other evidence in the case, and it is impossible to say that there were no legal grounds for the conviction of this prisoner. The appeal of Doorga Dass must be dismissed.

As to the second prisoner, the case is otherwise. There was no evidence before the Jury on which they could legally convict this man. The Judge would have done well to discharge him under Section 372 of the Criminal Procedure Code. The fact that a portion of the stolen property was found buried in land belonging to the prisoner, and adjoining his house, 8 days after the theft, when it is admitted that that land was entirely unenclosed and accessible to any one who might choose to resort to it for concealing the stolen property, is not evidence that the prisoner buried it or knew of its being buried. The only other evidence is, that on the day after Kedarnath Mahta's house was robbed, the prisoner went in a boat from Saidabad ghaut, at sunrise, to Baluchur with a man who had a bag in his hand. These facts may properly have led to the prisoner being

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suspected, but neither the one or the other, nor the two together, can amount to legal proof. A Jury may be satisfied with a minimum of proof, and it is beyond the power of this Court in such cases to interfere with its verdict; but when there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot, under such circumstances, be sustained.

The conviction of Rutton Dass must be set aside.

The 20th July 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Procedure—Jury—Evidence.

Revision of proceedings in the case of Huroo Shaha, accused.

In a case in which the prisoner was charged with murder and he made a confession that he did strike the deceased with a stick, the Sessions Judge, after considering the evidence, discredited the confession and all the evidence except that of the Medical Officer and discharged the prisoner, not considering it necessary that the case should go before a Jury.

HELD that the Sessions Judge had no right to pronounce his own judgment on the credibility of the evidence and to withdraw the consideration of the due weight to be given to the evidence from the Jury.

Ainslie, J.—THIS case was called up for revision by order of Mr. Justice Loch on a review of the Sessions Statements of Moorshedabad for May 1871.

Huroo Shaha was committed to take his trial on three charges—1*st*, Murder of Mussamut Komul; 2*nd*, Culpable Homicide by causing the death of the said woman; 3*rd*, that he voluntarily and without grave and sudden provocation caused grievous hurt to Mussamut Komul.

The accused on being brought before the Magistrate made the following statement:—

"Last Saturday, at 2 p. m., my wife let a goat loose which got into a neighbour's mulberry field and damaged it: he complained and I forbad her to do so. She paid no attention to me. I said why do you not attend, and went to strike her with a bamboo. The bamboo descended on her head and caused a wound and she died early on the following morning. This stick in Court is the one I used. It is now broken, but at the time I struck her with it, it was *not broken*. This statement I have made of my own free will."

The witness Gudi, sister of deceased, deposed that she saw Huroo strike deceased once on the left shoulder with a stick like the one produced in Court, and afterwards heard the sound of two other blows, but did not see them inflicted. After the beating, her sister came and sat in the verandah and complained, but did not show any marks, and as her head was covered witness saw no blood. In the evening her teeth began to clench and she remained in the same state all night and died at sunrise.

Chinibas, son of deceased, also stated that his mother did not die till morning: he did not see any assault nor any marks of blows on her person; he deposed that about midnight his mother went out of the house and returned unassisted.

Wazeer Shaha, connected by marriage with the accused, deposed that there was a quarrel between Huroo and Komul about the goats: the former had the stick produced in Court in his hand and was running after some body or something, witness did not know what; he did not see Huroo strike his wife, but she died at sunrise the following day.

Dr. White, the late Civil Surgeon of Moorshedabad, deposed that the deceased woman had a bruised wound on the top of the skull which was fractured to the extent of 5 inches, with great effusion of blood within it. Four ribs on each side were also found broken; the body was otherwise healthy.

Dr. White stated that death must have followed instantaneously after the blow on the head; that it was quite impossible that she could have survived from noon of one day to 6 a. m. of the next. And he further gave it as his opinion that the injuries to the ribs must have preceded that to the skull and that both were inflicted during life.

The Sessions Judge has acquitted the accused under Section 372 of the Procedure Code without putting him on his defence, on the ground that the medical evidence shows that the evidence of the witnesses as well as the admission of the prisoner are entitled to no credit. It is no doubt true that the story as told by the witnesses is palpably false in many particulars—and when the relationship

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of the parties is taken into account, it is easy to see that the accused and the witnesses have agreed upon such an account of the death of Mussamut Komul as seemed to them best calculated to reduce the offence committed by him to one falling far short of wilful murder.

But though the tale told by the witnesses may not be credible, and though it is evident that the statement of the accused was not a complete and true account of the manner in which Komul came by her death, we think the Judge had no warrant for the course he adopted.

There is the fact that Komul died a violent death, and there is no possible room to doubt that she received the injuries which caused her death in her own house. Huroo admits that he struck her over the head with the stick produced in Court, which we find the Judge in one place describes by the term "club." The medical testimony shows that the injury to the skull might have been so inflicted and that there had been but one below on the head, and that one a fatal one. Because the prisoner suppressed all mention of the maltreatment which caused the injuries to the ribs and because he must have misdescribed what followed after the blow on the head, it by no means follows that the statement that he did strike his wife on the head with a club and thereby caused a wound was false. On the contrary, the Civil Surgeon's testimony tended to prove that this much, at least, of his story was true.

The fact of death having been caused by that wound was sufficiently established by the medical evidence, and the Judge should have left the Jury to dispose of the case.

The case was withdrawn from the Jury not on the ground that there was no evidence in support of the charge, but because the Judge discredited the confession and all the evidence except Dr. White's. The words of the Judge are as follow:—

"I therefore discredit the confession and "all the evidence, except the medical, and "direct the prisoner's discharge, not consi-"dering it necessary that the case should go "before a Jury."

Considering that the trial was one by a Jury, we hold that the Judge had no right whatever to deal with the case in the way he has done; namely, to pronounce his own judgment on the credibility of the evidence and to withdraw the consideration of the due weight to be given to the evidence from the Jury, whose peculiar province it was to come to a finding on the evidence after they had been duly assisted by the summing up of the Judge. It was not a case in which there was no evidence and therefore no ground for proceeding with the trial. A grave error has been committed by the Judge in substituting his own conviction upon the evidence for that of the Jury. In fact a substantial case which appears to us to be conclusive of the prisoner's guilt has been improperly dealt with. We have sufficiently adverted to the strong points on behalf the prosecution, and to the misconception of the probative force of the evidence by the Judge in the reasoning he has advanced in support of the discharge of the prisoner. In conclusion, we regret to have to add that there has been a complete failure of justice in this case.

The 21st July 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Procedure—Accused—Examination—Evidence—Adjournment—Witnesses—Section 202 and Chapter XV, Code of Criminal Procedure.

Revision of proceedings in the case of Dinoo Roy and others.

The discretion of a Magistrate under Section 202, Code of Criminal Procedure, to ask questions of an accused is entirely unfettered, though an examination under that Section should not be of an inquisitorial nature, and a Magistrate should inform the accused that he is not bound to answer. Answers to questions under that Section are admissible in evidence, even if the Magistrate has omitted to warn the accused he need not answer.

In a trial held under Chapter XV of the Criminal Procedure Code it is not an irregularity to adjourn the trial under Section 269 for the purpose of allowing the accused to secure the attendance of his witnesses. As a general rule, a prisoner should have his witnesses present on the day of trial.

Ainslie, J.—THE Joint Magistrate of Nuddea, having convicted certain persons of being members of an unlawful assembly, sentenced them under Section 143 of the Indian Penal Code.

On appeal to the Court of Sessions the conviction and sentence were set aside for reasons assigned in the Judge's decision.

The Magistrate of the District thereupon submitted to the Judge certain comments on his decision with a request that he would forward them to this Court for the purpose of

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having certain questions arising out of the proceedings determined. The Judge has accordingly forwarded the Magistrate's comments with some further remarks by himself.

The points on which a difference of opinion between the Magistrate and Judge exists are thus stated in para. 3 of the Magistrate's remarks:—

The four principal faults found with the procedure are the following:—

1*st.*—That at an early stage of the trial the Joint Magistrate took the accused's statements, and thereby ascertained their defence.

2*nd*—That, in questioning the accused, the Joint Magistrate did not confine himself to special questions limited to special portions of the evidence which might have a tendency to convict.

3*rd.*—That after the prosecution was concluded, the Joint Magistrate postponed the case and summoned the witnesses for the defence.

4*th.*—That the accused had no fair opportunity of making a defence.

With reference to the first two points the Magistrate relies on Section 202 of the Criminal Procedure Code, which has been made applicable to trials under Chapter XV by Section 262A (this trial was under Chapter XV).

The words of that Section are—"It shall be "in the discretion of the Magistrate from "time to time, *at any stage of the enquiry*, "to examine the accused person *and to put* "*such questions to him as he may consider* "*necessary*. It shall be in the option of the "accused person to answer such questions."

The terms of the law admit of no doubt—the discretion of the Magistrate is unfettered. It was pointed out in Circular Order No. 13 of 28th July 1864 that the examination held under this Section ought not to be of an inquisitorial nature, and that it should be clearly explained to the accused that it is at his option to answer questions put to him or not; but it was ruled in the case of the Queen *versus* Nobodeep Chunder Gossamee,* that the answers given by a prisoner to questions put under Section 202 by a Magistrate are admissible in evidence, although the Magistrate may omit to inform the prisoner what the law is and that he is not bound to answer the questions. It is clear that even if a Magistrate do not exercise his discretion wisely, still this cannot be said to be an irregularity in his proceedings.

On the third point, we think the Magistrate is justified in contending that in a trial held under Chapter XV of the Criminal Procedure Code it is not an irregularity to adjourn the trial under Section 269 for the purpose of allowing the accused to secure the attendance of his witnesses. The Judge is doubtless right in observing that the law intends that as a general rule the prisoner should have his witnesses present on the day of trial, and in the case of Bhekha Roy *versus* Dhotun Roy, X Weekly Reporter, Criminal Rulings, page 36, this Court held that there were no grounds for interference where an adjournment for the purpose of summoning witnesses for the defence was refused in a trial held under Chapter XV,—but we cannot say of an adjournment in any one particular case that it is wrong in law.

The Judge's remarks are extended to trials under Chapter XIV. Looking to the terms of Section 253 and the manner in which an accused person is ordinarily brought before the Courts in trials under that Chapter, *namely*, by warrant and not by summons, we do not think they properly apply to such trials.

The fourth point as stated raises a question of fact in the particular case. This reference is not admissible as an appeal from the judgment of the Sessions Judge, but only to determine for future guidance doubtful points of law. In the statement of the first three heads of the reference the points of law on which the Magistrate desires our opinion appear sufficiently clear and we are able to answer them as abstract questions of law without going into the merits of the particular case, although they are submitted in the form of grounds of appeal in the case—but it is otherwise with this last head, and we are unable to give answers when no specific questions are submitted.

* 15 W. R., Criminal Rulings, p. 71, *foot-note.*

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The 21st July 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Procedure—Obstruction—Jury—Section 310, Code of Criminal Procedure.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Sylhet.*

Dino Nath Chuckerbutty on behalf of Hur Soonduree Chowdhranee,

versus

Hur Gobind Pal.

A Jury appointed under Section 310, Code of Criminal Procedure, is not legally constituted when the Magistrate appoints only the foreman of the Jury.

The award of a Jury under that Section long after the expiry of the time fixed for giving an award is illegal, and cannot be upheld by a Magistrate, who should in such a case take up the case himself and decide it.

Reference.—On the 27th of February last Dino Nath Chuckerbutty represented to the Magistrate that Hur Gobind Pal had dug a tank and heaped up some earth whereby two roads were obstructed. The application is by no means very intelligible, but this is all I can make out of it and the Magistrate was requested to cause the road (apparently only one) to be opened. On the same day the Magistrate ordered Hur Gobind to open the road or show cause. Hur Gobind appeared and asked for a Jury under Section 310, Code of Criminal Procedure.

On the 22nd March the Magistrate appointed a Jury in this way—each party nominated two persons and the Magistrate nominated the foreman, and time was given for submission of their report up to April the 7th, and the time was afterwards, *i. e.*, on the 6th, extended to April 24th.

On April 26th Hur Gobind intimated that two of the Jury were not working and expressed his dissatisfaction, on which a kyfeut was called for from the Jury.

On May the 5th a report signed by the foreman and the two persons nominated by petitioner was filed, the date thereof being April 23rd. On May 19th the Magistrate, in rather a curiously worded proceeding, ordered the award of the Jury to be carried out.

On the 19th June Hur Gobind applied to me by pleader under Section 434 pointing out—

1*st.*—That two of the Jury not having acted, there was no Jury.

2*nd.*—That the Magistrate, instead of nominating the foreman and two of the Jury, had only nominated a foreman.

3*rd.*—That the complainant has not made out his case.

This was forwarded to the Magistrate whose explanation is herewith submitted.

It appears to me that the Magistrate's procedure have not been according to law. Although the report is dated April 23rd it was not filed till 5th of May, and the functions of the Jury ceased from the 24th of April, the date fixed for the submission of the report. On 23rd April Hur Gobind intimated to the five Jurors that he had no confidence in them and wished them to cease and return the papers. On the back of this there is a note which appears to have been

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signed by all five to the effect that they ceased to act as Jurors. Two of these names appear to have been scratched out, so that on the 23rd three ceased to act. Then there is a paper bearing the same date (23rd April) signed by two of the Jurors by which the Magistrate is informed that they had ceased to act. I may observe that one (Brojo Nath) appears to have signed both the papers and subsequently scratched his name out. Dino Nath in his original petition gives neither length nor width of the road. The three Jurors who signed the report say the width is not exactly ascertainable, but from what the witnesses say and the appearance of the locality they think a road 10 or 12 hats wide as before should be opened.

Taking Dino Nath's application and the map signed by three of the Jurors it is apparent, 1st, that there is no knowing what Dino Nath wanted; or 2nd, what the three Jurors have recommended, as what he desired. In fact the whole business appears to me to be illegal, irregular, and unintelligible from beginning to end, and I think the Magistrate's order under Section 310 should be set aside.

The whole of the papers of the case are herewith forwarded.

Judgment of the High Court.

Jackson, J.—We think that the Jury was not legally constituted, as the Judge has pointed out, and that its award, long after expiry of the time fixed for giving an award, was invalid, and that it was subsequently the duty of the Magistrate to take up the case himself, enquire into it, and decide it. We set aside his orders upholding the award of the Jury.

The 21st July 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction — Civil Court decree — Breach of the Peace—Section 318, Code of Criminal Procedure.

(Miscellaneous case.)

Rai Mohun Roy and others, *Petitioners,*

versus

Mr. J. P. Wise, *Opposite Party.*

Messrs. W. A. Montriou and *J. S. Rockfort, Baboos Hem Chunder Banerjee, Chunder Madhub Ghose, Sreenath Banerjee* and *Gobind Chunder Dass* for the Petitioners.

The Advocate General (Graham), Mr. C. Gregory and *Baboos Kalee Mohun Dass* and *Kashee Kanth Sein* for the Opposite Party.

A Magistrate is not competent to interfere under Section 318 of the Code of Criminal Procedure with the execution of a decree of the Civil Court. When a Civil Court decree has been passed regarding the whole or any portion of disputed land, it is the Magistrate's duty to maintain that decree, and he cannot again institute Section 318 proceedings regarding the land covered by it.

Mookerjee, J.—I AM wholly unable to make out why there should be so much difficulty in determining the western boundary of the lands decreed to the Roys by the High Court in 1865. It appears that there was an Act IV proceeding regarding this land in 1848, which was decided in favor of the predecessors of Mr. Wise. The 1st party brought a civil suit to set aside the possessory order passed by the criminal authorities and obtained a decree from the High Court giving them possession of lands as per boundaries given

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in the plaint, which appear from the plaint to be the land for which the Act IV proceedings were instituted. In execution of the decree thus obtained the plaintiffs, the Roys, obtained possession through the Nazir of the Subordinate Judge of Tipperah, when the Nazir went to the spot in 1867 to give the Roys possession of the land decreed to them. The other party, namely, Mr. Wise, though duly summoned, did not appear before that officer. The Nazir therefore gave possession according to the boundaries mentioned in the decree and filed a receipt given by the Roys. The judgment-debtor Wise objected to the proceedings of the Nazir and alleged, among other things, that the Nazir gave possession to the Roys of more lands than what they were entitled to obtain in execution of the decree of the High Court. They contended that whereas the Roys were entitled to 2,092 beegahs of land, the Nazir had given them possession of an area of 2,589 beegahs.

The Subordinate Judge of Tipperah however disallowed this objection, and held that as possession had been given according to boundaries it does not matter whether the area is more or less. There was an appeal to the High Court, but the High Court upheld the order of the Subordinate Judge. In the present case the Roys contended that Mr. Wise is attempting to take possession of a portion of the land decreed to them by the Civil Court, and prayed that the Magistrate would be pleased to maintain them in the possession given to them by the officer of the Court in execution. Mr. Wise, on the other hand, urges that the lands in dispute are outside of the decree and belongs to his estate, and that he has all along been and is still in possession of them.

It appears that the Magistrate originally instituted proceedings under Section 318 of the Criminal Procedure Act, but being unable to determine which party is in actual possession passed no order as to possession, but took steps to prevent disturbances. The 1st party after an unsuccessful application to this Court again moved the Magistrate to determine the fact of possession in their favor. Thereupon the Magistrate again repaired to the locale, and after some inquiry decided that the Roys should be maintained in possession of the land on the east of a line drawn by him running north to south, while Mr. Wise is to remain in possession of the lands to the west of that line.

It does not appear upon what evidence this line was found to be the dividing line between the properties of the two contending parties. It does not also appear that any of the parties pointed out this line as the limit of their possession. It must, therefore, be held that it was arbitrarily drawn in order to prevent breaches of the peace likely to be committed.

I think that in this case the Magistrate ought first to have ascertained whether this disputed land was or was not covered by the decree of the Civil Court and whether possession of it had been given to the 1st party by the Nazir in execution. It appears that the officer who gave possession to the Roys was at the spot; he pointed out to the Magistrate the land of which he gave possession to the decree-holders. The Magistrate however does not clearly state whether he believes the evidence of this officer or not. He merely says that possession was given to the Roys in the rainy season, and therefore it is not clear how far the Bheel, which was the western boundary of the lands decreed, then extended.

[The judgment then proceeded to show how the Magistrate could have ascertained the position of the lands in this case.]

The Magistrate is not competent to interfere under Section 318 with the execution of

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a decree of the Civil Court. He is bound to maintain the party in possession who has obtained a decree from the highest Court of the country and recovered possession in execution of that decree. The point therefore for his decision was, in the first instance, whether the decree covers the land which is the subject of dispute in the present case. If he finds that point in favor of the Roys he should, under Section 319, maintain them in possession; but if he finds that the lands are not the lands decreed in 1865, he should try to find out who is in *de facto* possession of them. If the fact of possession is not clear, but extremely doubtful, the course indicated by the law may be followed, namely, the subject of the dispute may be attached until a competent Civil Court shall have determined who ought to be in possession.

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Jackson, J.—The Magistrate's order for possession, in this case, seems to me to be drawn up in such terms as almost to leave the actual possession undetermined. Though a line has subsequently been drawn demarcating the western boundary of the estate of the Roys, still under the order distinct possession of all the lands east of that boundary is not given to the Roys. The line has been prepared not with any attempt to maintain in force the decree of the Civil Court, but simply on the statements of the ryots as to the party to which they are paying rents.

I think that it is the duty of the Magistrate, in proceedings taken under Section 318, when it appears that a Civil Court decree has been passed regarding the whole or any portion of the disputed land, to maintain that decree. The Magistrate's powers under Section 318 relate to land regarding which there is a dispute which has not been decided by a Civil Court, and his order for possession remains in force only until some such decree is passed. When such decree has been given, the Magistrate has no power again to institute Section 318 proceedings regarding the land covered by it The dispute regarding that land has been finally determined, and it is then the Magistrate's duty to treat the decree-holder in the Civil Court as the owner of that land and give him every protection in the use and enjoyment of it. There seems to have been evidence before the Magistrate in this case upon which he could have determined whether any and what portion of the disputed land was covered by the decree, and by the execution proceedings subsequent to the decree, which must be treated as in fact carrying out that decree.

My learned colleague has pointed out how the Magistrate can ascertain what lands are covered by the decree. The Magistrate does not allude to the evidence regarding the boundary stated in the decree He seems to distrust the evidence of the Nazir who personally executed the decree, but he states no reason for distrusting it; and manifestly that Nazir must be the best witness as to where the line between the two estates was laid down by the Civil Court. If, after making every enquiry, the Magistrate cannot ascertain where that boundary line is, he must act under Section 319. But it does not appear that any real attempt has been made to ascertain it.

There would never be an end to litigation, if the Magistrate will not keep in force the decision of a Civil Court regarding lands. It has been said before us that the boundary line which has been drawn in fact corresponds with the boundary line of the Civil Court decree. Whether this is so or not we cannot tell. That line has not been drawn as being the boundary in the Civil Court decree and execution proceedings, but merely on the statements of the ryots.

The orders passed by the Magistrate must be set aside, and he must re-determine this case after giving the parties opportunity to adduce any further evidence they may wish.

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The 24th July 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Public Servant — Supernumerary peon — Illegal gratification — Sections 21 and 161, Penal Code.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Backergunge.*

The Queen *versus* Ramkisto Doss and another.

An occasional or supernumerary peon appointed under the orders of the Board of Revenue in accordance with Section 6 Act V of 1863, B. C., and paid under that Section by fees whenever employed, is a public servant under Clause 9 Section 21 of the Penal Code, and as such may be tried of receiving an illegal gratification under Section 161 of that Code.

Reference.—Ram Charan Singh is a Collectorate peadah and he was deputed to keep order in the Special Sub-Registrar's office and to pay in money to the treasury, &c.

On the 21st ultimo Mr. J. B. Pratt, the Special Sub-Registrar, saw him receive something from one Ramkisto Doss, and getting up immediately he caught hold of Ram Charan and found that what he had just received was an eight anna piece. Mr. Pratt thereon had the man prosecuted for receiving an illegal gratification, and the case was made over for trial to Mr. Hand.

That Officer however without going fully into the case dismissed it and discharged the prisoner on the ground that he was not at the time a public servant.

It appears to me that this view is altogether erroneous. The Deputy Magistrate's argument is that Ram Charan was not a public servant on the 21st June because he was not there in the receipt of pay. He remarks that he only gets pay when he has processes to serve and that therefore "he will be a public servant only for so long as he may be engaged in the particular service to which he may be deputed." But I submit that Ram Charan is remunerated by fees for the performance of his duties and that he therefore is a public servant of the ninth description mentioned in Section 21 of the Indian Penal Code. Ram Charan's real position is as follows:—He is what is called an occasional or supernumerary peon and is appointed under the orders of the Board of Revenue and in accordance with Section 6 of Act V of 1863, B. C. That Section makes provision for two classes of peons, one to receive fixed salaries and the other to be remunerated by fees, and Ram Charan belongs to the latter class. He is registered in the book provided for the purpose (Register M) and he holds a chaprass or badge.

It therefore seems to me to be an untenable quibble to say that he was not a public servant on the 21st June because he was not drawing pay on that day.

The receipt of pay is not the test by which to know a public servant, and it would, I think, be most dangerous to allow a person in the position of Ram Charan to escape from any punishment he may have deserved by the plea that he was not drawing a salary at the time.

Even if it were granted for a moment that he was not a public servant, he was certainly expecting to be one, for the ranks of the salaried peons are filled up from the supernumeraries, and Section 161 is therefore wide enough to include his case.

It seems unnecessary to call for the explanation of the lower Court as Mr. Hand has already given the grounds of his view of the case at full length.

I may add that I have referred the matter because an important precedent would be established if no notice were taken of it, and because I have failed to convince the Deputy Magistrate that he is in error.

Judgment of the High Court:—

Ainslie, J.—We are of opinion that the view taken by the Magistrate is correct. Section 21, Clause 9 includes, among public servants, "every Officer in the service or pay "of Government or remunerated by fees or "commission for the performance of any "public duty." Mr. Hand reads this as if the word "and" were substituted for the first "or," that is, as if the Clause stood "every Officer in the service of Government paid by the Government or remunerated by fees or commission," but the words of the law are more extensive. Explanation 2 appended to the said Section disposes of the objection that the employment of the accused was in contravention of a rule of the Board of Revenue. As said in the Commentary on the

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Penal Code by Messrs. Morgan and Macpherson "according to the second explanation "a person who *in fact* discharges the duties of "the office which bring him under some one "of the descriptions of 'public servant' is "for all the purposes of the Penal Code "rightfully a public servant, whatever legal "defect there may be in his right to hold the "office." The accused person was, wrongly perhaps, appointed to discharge the duties which should have been entrusted to a paid servant of the Government, but if he (to use the words of the Commentary above quoted) "being to all appearance a public servant," (which unquestionably he was) "accepted a "bribe or was obstructed in the execution of "his duty, the penal provisions of the Code "are applicable, and he will be punished "in the one case and protected in the other, "notwithstanding that there may be legal "defects in his right to the office." The order for the discharge of Ram Charan Singh and Ramkisto Doss must therefore be set aside and the trial of the charges against them must be proceeded with.

The 24th July 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Procedure — Accused — Subpœnas — Witnesses for defence — Adjournment—Chapters XII, XIV, XV, Code of Criminal Procedure.

(Miscellaneous case).

Bholanath Mookerjee and others, *Petitioners.*

Mr. H. Cowell and *Baboo Debender Chunder Ghose* for the Petitioners.

Held by Ainslie, J., that in cases falling under Chapter XV of the Code of Criminal Procedure the accused person has no right to a summons to a witness after the Magistrate has proceeded under Section 266 of the Code to hear him and such witnesses as he shall then produce in his defence; that in cases falling under Chapter XII, the accused has no right to a summons except in respect of persons named by him in a list to be given at once on hearing the charge, or on hearing and being furnished with a copy or translation of the charge; and that in cases under Chapter XIV, the Magistrate is bound to summon only witnesses mentioned at the time when the accused is put on his defence under Section 252 or at some time previous to this, and that it is discretionary with the Magistrate to summon other witnesses,—the words "at his discretion" in Section 253 being read with Section 254, and so with Sections 189 and 191.

Per Paul, J., Contra:—When a prisoner is put upon his trial and applies to have any witnesses subpœnaed, the Magistrate is, according to the true construction of Section 253, bound to summon those witnesses though he is not obliged to adjourn the trial,—an application for subpœnas upon witnesses being quite a different thing from an application for an adjournment.

Ainslie, J.—THIS is an application under Section 404 of the Code of Criminal Procedure on the part of Bholanath Mookerjee and others who were convicted and sentenced by the Assistant Magistrate of Jessore on the 20th January under Section 150 of the Penal Code. The conviction and sentence were affirmed by the Sessions Judge.

The ground of the application is that the Magistrate refused to summon certain witnesses for the defence named by the petitioners in a petition dated 29th Pous, corresponding to the 10th January 1871. On referring to this petition it appears that it was presented on the 12th January 1871.

Witnesses for the prosecution were first examined on the 21st December, and further evidence was taken on the 28th and 29th idem. On the 31st, charges against the accused were drawn out as required by Section 250 of the Criminal Procedure Code.

On that same day the answer of each of the accused was taken down in writing and in their respective answers they named witnesses for their defence. These witnesses were summoned to appear on the 12th January, and on that day 22 were examined. At the close of their examination the following order was made:—

Adjourned till to-morrow to enable remaining witnesses or returns to come in—accused in *statu quo*—Heard witnesses discharged.

At some time in the course of this day the petition above alluded to was put in, as appears from the order endorsed;—file with nuthee 12-1-71.

The body of the petition is an answer in writing to the charges preferred. It concludes with a prayer to the Magistrate to hold an enquiry in person on the spot where the disturbance occurred or to send for certain persons named at foot and described as persons of respectable character.

The question is whether the Magistrate was bound by the law to issue summons to these persons. I am of opinion that he was not bound to do so.

There are three Chapters of the Criminal Procedure Code which contain the rules for

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the investigation by Magistrate of charges of Criminal offences.

Offences are divided into three classes according to their gravity, and a particular Chapter is devoted to each.

Chapter XV treats of cases triable by a Magistrate in which a summons on complaint shall ordinarily issue, and by Section 257 these are defined as trials of offences punishable with fine only or with imprisonment for a period not exceeding 6 months.

Chapter XIV treats of cases triable by a Magistrate in which a warrant on complaint may issue, and Section 248 describes these as trials of offences triable by the Magistrate and punishable with imprisonment for a period exceeding six months—and Chapter XII treats of preliminary enquiry by the Magistrate in cases triable by the Court of Session.

In the first class of cases, those of the least gravity, the ordinary proceeding is to issue a summons to the accused person to attend at a certain time and place to answer the charge made against him (Section 257). Section 260 provides for compelling the accused to come in if he fails to attend on the summons.

Then by Section 265 it is provided that on the day fixed for the trial, on the appearance of both parties, the substance of the complaint shall be stated to the accused person and he shall be asked if he has any cause to show why he should not be convicted. If the accused person do not admit the truth of the complaint, the Magistrate, under Section 266, shall proceed to hear the complainant and such witnesses as he may produce in support of his complaint, and also to hear the accused person and such witnesses as he shall produce in his defence. By a later Section (269) it is lawful for the Magistrate, before or during the hearing of the complaint, to order an adjournment.

The only provision in this Chapter for summoning a witness at the request of the parties is that contained in Section 262, by which a Magistrate is bound to issue a summons to any person to appear and testify what he knows concerning the matter of the complaint, if it appears to the Magistrate that such person is likely to give material evidence on behalf of the complainant or of the accused person and that such person will not voluntarily attend *at the time* and place *appointed for the hearing of the complaint.*

These words "at the time appointed for the hearing of the complaint" show distinctly that the law does not contemplate the issue of a summons to a witness at the request of the parties as a matter of right, except when the application is made at a time preceding that at which under Sections 265 and 266 the trial is ordinarily commenced and completed —and that even this right is not absolute, but is to some extent limited by the opening words of Section 262, words of which no equivalent is to be found in Chapters XIV and XII. No doubt, a Magistrate may, under Sections 269 and 263, adjourn the hearing and may summon any witness whose evidence he may consider essential to the just decision of the case, but this is a discretionary proceeding which he may adopt for his own satisfaction and not one which the law compels him to follow on the application of either party. The case of Bhikha Roy, X Weekly Reporter, Criminal Rulings, page 36, is in accordance with this construction. It is there said that Section 252 does not apply to proceedings under Chapter XV, but Section 266 does so; and that "the "terms of Section 266 read with Section "262 apparently suppose that the defendant's "witnesses attend voluntarily and accom-"pany the accused."

These words by themselves are not quite clear, as they do not specifically mention witnesses summoned to appear, but their intention is evident when the case is looked into. The question was whether a Magistrate ought not to have *called upon* the accused to produce witnesses in support of his defence, and the officer who made the reference relied upon Section 252. The answer was that under Chapter XV a Magistrate does not call upon an accused person to produce his witnesses, but hears them if they are in attendance and are produced.

In respect of the last class of cases, those of the greatest gravity investigated under Chapter XII, there is a very distinct provision contained in Section 227. As soon as the charge on which the accused person is to be tried has been prepared it is to be read to him and a copy or translation, if required, is to be furnished to him. "The accused "person shall be required *at once* to give in, "orally or in writing, a list of witnesses "whom he may wish to be summoned to "give evidence on his trial before the Court "of Session or Supreme Court. *It shall be "in the discretion of the Magistrate to allow "the accused person to give in any further "list of witnesses at a subsequent time.*" The

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prisoner can demand a summons, *as of right*, in respect of any witness named in his first list, (subject to payment of expenses in certain cases provided for in Section 228), but he cannot do so in respect of any witness in any subsequent list. This is expressly stated in Section 375 in the following terms:—The accused person shall be allowed to examine any witness not previously named by him, if such witness be in attendance, but he *shall not be entitled of right* to have any other witness summoned than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial, except as provided in Section 246 of this Act, *i. e.*, when a charge has been amended or altered and proceeding immediately is likely to prejudice the accused.

Thus it appears, that in the lowest class of cases an accused person has *no right* to a summons at all *after* the Magistrate has proceeded under Section 266 to hear him and such witnesses as he shall *then produce* in his defence, and that in the highest class of cases, those that are beyond the jurisdiction of the Magistrate and in which the form of proceeding by commitment to another Court of necessity entails an adjournment, the accused has *no right* to a summons except in respect of persons named by him in a list to be given *at once* on hearing the charge, or on hearing and being furnished with a copy or translation of the charge, as the case may be.

But it is contended that in the intermediate class of cases triable by a Magistrate under Chapter XIV, the accused is entitled to summons to a witness *as of right*, whenever and as often as he demands it, up to the moment when the trial closes by judgment and sentence.

I find this Chapter standing between the other two above referred to, and the provisions for the investigation of offences classified according to their heinousness, following each other in regular series from those which apply to the gravest offence, such as murder punishable with death, down to those which apply to the most trifling misdemeanour, such as misconduct in public by a drunken person punishable under Section 510 of the Penal Code with simple imprisonment for a term not exceeding 24 hours, or with fine not exceeding rupees 10 or with both; and I think I am entitled, or I would rather say bound, to look to the form of the entire Code, and in any case of doubt to interpret one part by the others, so as to apply a construction of the doubtful point not inconsistent with the express provisions on similar points contained in other portions of the Code. And if I do so, I cannot but say that it is inconsistent that a man tried by a Magistrate for theft under Section 379 of the Indian Penal Code and liable to be sentenced by such Magistrate to a term of imprisonment not exceeding 2 years, should have greater privileges, in respect of his defence, than a man sent to be tried by the Court of Sessions on a charge of murder and liable to capital punishment. I see that a man charged with theft under Section 379 may be punished by a Magistrate with a term of imprisonment extending from 1 day to 2 years or that he may be committed to the Sessions and sentenced by the Sessions Judge to a term of 3 years imprisonment. If the Magistrate thinks that a person accused of theft ought to receive greater punishment than he is competent to inflict, and sends him to the Sessions Court, he will be deprived of a right which he would have in a trial by the Magistrate for an offence of precisely the same character, only differing in degree, for which the Magistrate considers a sentence of 6 weeks imprisonment ample, if the rule contended for is adopted.

To my mind, it is simply impossible that this can have been the intention of the Legislature, and therefore, unless I find that I am strictly tied down by the words of the Law to the construction contended for, I must hold it to be an unsound construction.

Now it appears to me that there is nothing in the Law which compels me to adopt this construction. The provisions of Chapter XIV are as follows:—By Section 250 it is provided that when the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate shall consider necessary have been taken, the Magistrate, if he find that no offence has been proved against the accused person, shall discharge him. If the Magistrate find that an offence is apparently proved against the accused person * * he shall prepare in writing a charge. By Section 251 it is enacted that the charge shall be then read to the accused person and he shall be asked whether he is guilty or has any defence to make. Section 252 runs as follows:—

If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.

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Then comes Section 253 as follows:—

The Magistrate shall summon any witness and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, at his discretion, adjourn the trial from time to time, as may be necessary.

As I read these provisions, they prescribe that as soon as the charge is prepared the accused shall be called upon to plead to it. If he plead not guilty, he shall be called upon to state any thing that he may have to say in answer to the charge and if his witnesses are in attendance to bring them at once before the Court.

If he shall have any witnesses to call who do not attend voluntarily he shall be entitled to a summons, whether he apply for such summons at the time he is called on to make his defence or previously; and the Magistrate may, if necessary, adjourn the case for the production of the accused person's witnesses —and if the witnesses are then named for the first time the adjournment under the first part of the 253rd Section becomes imperative. The use of the words "shall" and "may" in Section 253 appears to me susceptible of a clear explanation. On looking to Section 252, it will be seen that it is assumed that the accused may possibly have his witnesses ready at the time he is called on to enter on his defence. They may either have come voluntarily or they may have been brought in by summons, but it may be that summonses to the witnesses have been duly issued and that they have failed to attend and have possibly become liable to be brought in under warrant under Section 191 or to be otherwise proceeded against under Section 189—but the proceedings under these Sections are not matters of course, but dependent on the discretion of the Magistrate, to be exercised under the circumstances specified in those Sections—see case of Abdoor Ruhman, VII W. R., Criminal, p. 37 (misprinted 55)—and therefore it is not said that the Magistrate *shall*, but that he *may* adjourn the trial for the attendance of the witnesses; because in this case he will at an earlier stage have done what was obligatory, and will, at the time of taking the defence, have discretion as to taking further steps. I read the words "at his discretion" in Section 253 with the following Section, Section 254, and so with Sections 189 and 191.

I hold that the words "shall summon any witnesses that may be offered" are to be taken as used in reference to the time when the accused is put on his defence under Section 252 or to some time previous to this. It appears to me that the course of procedure laid down above is strictly in accordance with the words of the law and is the only reasonable construction they admit of. If it is said that the words "shall summon" in Section 253 have no reference to that particular time, but apply equally to witnesses offered at any subsequent time, I cannot reconcile them with the words "may at his discretion adjourn." I cannot conceive that the Legislature intended that a Magistrate should be bound to issue a summons, but that he should not be bound to give it a chance of being operative—that while his clerk was drawing up the summons, he, refusing an adjournment, might be passing sentence on the accused. But if it is said that I myself hold that the word "may" is to be taken under certain circumstances as if it were "shall" and that my argument is therefore inconsistent. My answer is that this 253rd Section is to be read with the preceding and following Sections and is not to be detached from the context: and that if we so read it there is no doubt or ambiguity, but that it is quite clear when the obligation ends and when the discretion begins. The issue of summons in the first instance, if applied for, is obligatory and therefore the discretionary power of adjourning or refusing adjournment does not come into play. Any adjournment beyond the day fixed by the summons issued on the taking of the defence under Section 252 is discretionary, and therefore the issue of any further summons to witnesses not named at the time the defence is entered on is not obligatory.

In the course of argument another ground has been put forward which is not taken in the petition on which this case was called up for revision. I do not consider myself in any way bound to admit this in the special case, but I proceed to notice it rather that it may not be supposed that I dissent from the argument than because it is material in this case. It has been said that even if a Magistrate be not strictly bound by the law to issue summons after summons to every fresh batch of witnesses named by an accused person at any time up to final judgment and sentence, yet he would not be exercising a sound discretion in refusing to do so—that the discretion allowed to him by law is to be exercised reasonably and not capriciously, and that such a refusal being unreasonable we should be justified in interfering.

I understand that it was distinctly admitted that such fresh summons must be returnable

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on the day to which the trial may, at the date of its issue, stand adjourned, and that it was not pretended that the Court would be in any way bound to defer the conclusion of the trial in consequence of its issue. The practice of the Civil Courts was referred to. There is a distinction between the mode of issuing processes in the Civil and Criminal Courts. The former are issued at the expense of the parties; the latter, except in the case noted in Section 228 of the Criminal Procedure Code, are not at their expense. I do not refer to this as being of any great importance, still I think that under certain circumstances analogous to those stated in Section 228 it might be an element in a question whether a Magistrate had properly exercised his discretion. As a general rule, I quite concur in what has been said, namely, that an accused person should not be refused a subsequent summons to a witness to appear on the day to which the trial may stand adjourned, applied for on the chance of his being able to derive benefit from it, he thereby acquiring no right to an adjournment.

But in the present instance the petitioners can derive no advantage from this rule. Their defence was taken on the 31st December and they then gave in lists of their witnesses. These witnesses were summoned on the 12th January, and on that day the Magistrate proceeded to hear those who had attended, 22 in number. He then adjourned the case to the next day to give time to other witnesses to appear, and for the receipt of returns to some of the processes which had not on the 12th come to hand. As a matter of fact the other witnesses did not appear till the 18th and were then examined and judgment was delivered on the 19th, but at the time when the petition of 29th Pous was put before the Magistrate, namely, on the 12th, the case stood adjourned only till the following day; if indeed, the petition was not put in before the adjournment. The prayer of that petition was not merely to get a summons on the chance of being able to bring the witnesses named into Court before the case closed. The object was clearly to get an adjournment and to have a fresh enquiry started either by the Magistrate proceeding to the scene of the offence or by his calling for and examining a number of persons described as respectable and independent persons. That it was so understood by the parties themselves is quite clear from their not taking the point now raised in their appeal to the Judge or in their petition to this Court. I cannot say that the Magistrate was wrong in refusing to exercise his discretion by summoning the witnesses on the chance of their being able to come in without an adjournment, when neither he nor the petitioners believed that he was asked to exercise such discretion. Looking to the terms of the petition and the state of the proceedings when it was presented I have no doubt that what was asked for was a re-opening of the whole case, and that only. Therefore I think the ground now taken is not admissible and that there was no error in law warranting our interference. I therefore dismiss this application.

Paul, J.—In this case Mr. Cowell, on behalf of the prisoners who have been convicted, applied for the interference of this Court in the matter of their conviction, on the ground that certain witnesses whom these prisoners desired to call, and for that purpose prayed that subpœnas should be issued, were not subpœnaed by the Magistrate who tried the case. The Magistrate in fact refused to issue subpœnas, maintaining that the prisoners could not claim to call those witnesses as a matter of right. The Magistrate considered that at the stage of the case at which the application was made, it was purely a matter of discretion with him to issue subpœnas, and, for reasons recorded in his judgment, he declined to exercise his discretion.

The facts, so far as they are material to this application, are as follow:—

The case of the prosecution was closed on the 28th December last, after having been adjourned once at least for the examination of witnesses other than those originally named by the prosecution. On the 31st of December, the Magistrate determined to try the prisoners summarily, and accordingly on that day put them on their defence. On the same day, that is, on the 31st December, the several prisoners stated generally the nature of their defence and named certain witnesses for whose attendance they demanded subpœnas. The subpœnas were duly granted and the case seems to have been adjourned to the 12th of January. On the 12th January, certain witnesses were examined and in consequence of the absence of some witnesses who had been subpœnaed the case was adjourned till the following day. On the same day the prisoners put in an application praying, amongst other things, to have some other witnesses called and examined and in substance demanded that subpœnas should be issued in respect of those witnesses. It does not exactly appear whether this application was made before the adjournment or after it. In the absence of

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anything to show that the application was made after the order for adjournment, I must assume that the application was made while the case was judicially before the Magistrate and before the adjournment was announced.

For some reason which does not appear on the record, the case was not taken up on the 13th but on the 18th of January. Witnesses were examined on the 18th and 19th and judgment was given on the 20th January convicting the prisoners, the present applicants. I should also remark that it is stated in the affidavit which has been put in on behalf of the prisoners—and I see no reason to doubt the statement—that the witnesses whose examination the prisoners demanded on the 12th of January might have been served with subpœnas in a few hours, namely, six hours. I conclude from this statement that, had the subpœnas been granted and served, the witnesses so summoned to attend might fairly have been expected to be present either on the 13th of January or the following day.

The prisoners urge before us that under the circumstances which have transpired they were absolutely entitled to subpœnas for the witnesses named in the application of the 12th of January; and I think it is clear that they had a *right* to have those witnesses summoned to attend, the prisoners running the risk of those witnesses arriving before the trial was concluded. I think the prisoners were entitled to have this clear right enforced unless there is something in the Criminal Procedure Code to show that such a right is absolutely taken away by express enactment. Before I proceed to examine the provisions of the Code of Criminal Procedure applicable to this case, I would observe that an application for subpœnas upon witnesses is quite a different thing from an application for an *adjournment*. The former may be granted without the latter being either applied for or granted. One may exist without the other, and is by no means necessary that both should co-exist. I make these remarks because the whole argument which tends to show that the prisoners had no right to have the witnesses named on the 12th January subpœnaed proceeds on the basis that the issue of fresh subpœnas involved the adjournment of the trial.

Now turning to Sections 251, 252 and 253,—I observe that Section 251 runs as follows:—

"The charge shall be read to the accused "person, and he shall be asked whether he "is guilty or has any defence to make." Section 252 directs that—"If the accused "person have any defence to make to the "charge, he shall be called upon to enter on "the same and produce his witnesses, if in "attendance, and shall be allowed to re-"call and cross-examine the witnesses for "the prosecution."

This Section certainly assumes that when a prisoner is put upon his trial he must go on with his defence then and there.

Section 253 enacts as follows:—"The "Magistrate *shall summon* any witnesses and "examine any evidence that may be offered "in behalf of the accused person to answer "or disprove the evidence against him, and "*may for this purpose at his discretion adjourn* "*the trial from time to time as may be* "*necessary*."

The language of this Section—The Magistrate shall summon witnesses and may at his discretion adjourn the trial—must be clearly kept in view in dealing with the present case.

Now I take it that the prisoner in making his defence at an adjourned hearing is entitled to the privileges to which he would have been clearly entitled if the trial had taken place as contemplated by Section 252 at the time of the prisoners being put on their defence, subject to this reservation that the accused persons could not claim as a matter of right a further adjournment. It is obvious that when a prisoner is put upon his trial and applies to have any witnesses subpœnaed, the Magistrate is, under Section 253, bound to summon those witnesses, though he is not obliged to adjourn the trial.

It may well happen in a particular case where the trial is a protracted one, that the witnesses may arrive before the trial is concluded. As the accused person is entitled to have his witnesses summoned on the day of the trial, I see no objection to his being entitled to have the same right enforced on the 2nd or any other day of his trial, provided he merely applies for subpœnas and does not ask for an adjournment to enable his witnesses to arrive and be present in Court. I find no limitation in point of time stated in Section 253, nor do the words of that Section give rise to a clear or necessary implication to that effect. On the contrary, the language of that Section, by drawing a distinction between the Magistrate's duty in summoning witnesses which is declared to be imperative, and the power to grant an adjournment which is left discretionary, clearly indicates that the accus-

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ed person is entitled as of right to have his witnesses subpœnaed. Discretion in such a matter must necessarily be out of place, for the Magistrate cannot be supposed to know beforehand the value or importance of the evidence to be given by a particular person. Now, in the present case, long before the trial was concluded, the Magistrate was of opinion that the discretion which was (as he thought) vested in him, should not be exercised on the general principle that trials may be protracted to any length if such an application as the prisoners made were entertained. I fail to see how the exercise of discretion (assuming the matter was discretionary) in a particular case can be regulated by such general reasoning. If any general principle is to be involved in determining or defining discretion, I apprehend the Legislature would have acted on such general principle, affirmed it by a positive enactment and declared it to be a positive law, and thus displaced discretion in the sense in which the word is understood from its provisions. Discretion must in all cases be exercised with reference to the particular facts of a given case; the exercise of discretion must not be capricious, as it appears to me to have been in this case. The right of a prisoner to have witnesses subpœnaed during the pendency of a trial, which I may designate an ordinary and natural right, is not only not taken away by the terms of Section 253, but affirmed, for the Section declares that the Magistrate shall summon witnesses upon the application of the prisoner, *and he may adjourn the trial.*

The language used in the Section shows distinctly that the grant of subpœnas need not be accompanied by an adjournment. Were it otherwise, the Magistrate's discretionary power to adjourn the trial would render his imperative duty created by the Section also discretionary, and in cases in which caprice is substituted for discretion altogether nugatory.

By Sections 227 and 375, which relate to prisoners put upon their trial before the Sessions Court, the prisoner is bound by the list of witnesses which he puts in at first, and he cannot call, as a matter of right, any witnesses other than those he has named in that list. That being the state of the law in a trial of greater gravity and importance, it is argued that we should assume that the spirit of the law of procedure is against allowing prisoners, in summary trials, being trials of less importance, to have witnesses called who were not originally named.

I do not wish to enter into any lengthy discussion of this matter here, because it is obvious that all argument drawn from analogy assumes the existence of the same or similar circumstances; and further where any positive Law exists which applies to one class of cases, and does not, by its terms, embrace another and distinct class of cases, the only argument to be drawn is that the particular positive Law was not intended to apply to the cases which are left out of its operation. If I were asked to assign a reason for the difference, I should say that abundant reasons exist and account for the difference in the law in the two classes of cases.

It must be conceded that the interval of time which elapses between a commitment by a Magistrate and a trial before the Sessions Judge, furnishes unscrupulous persons with the opportunity of concocting a fresh defence to be supported by false evidence through the medium of witnesses not previously named, and thus enables such persons, unless otherwise restrained, to take the prosecution by surprise. In Courts in which the power of cross-examination is rightly and ably exercised by a bar of trained and accomplished advocates, falsehood is readily exposed and an invented tale is almost certain of detection; so that surprises rarely succeed and truth generally triumphs over falsehood.

It is, however, a matter of notoriety that the power of cross-examination is but feebly exerted in Mofussil Courts, and the art of eliciting the truth by searching and relevant questions is but imperfectly understood. The sifting of evidence is consequently far from exhaustive, and in fact oral evidence is tested and dealt with in a manner different to the treatment it receives in other Courts of original jurisdiction at the hands of advocates of higher legal attainments. These considerations may reasonably have induced the necessity of introducing into the Mofussil in trials held by a Court of Sessions a law of procedure which either prevents or reduces the chance of surprise on the prosecution, and which averts the possibility of a defence previously wholly unknown to the prosecution being stated, and of evidence of witnesses not previously named, subject to a special restriction, being adduced. Owing to the undoubted and radical defects existing in the ordinary Mofussil practice, precautionary measures recommend themselves to the Legislature on the ground of expediency, and I accordingly perceive

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sufficient reason for the introduction of a procedure in trials before a Sessions Judge which contains provisions for the statement of the defence before trial and requires the witnesses to be named to the committing officer. The dangers to be averted on which I have dwelt can scarcely attend a summary trial which according to Section 252 should proceed without delay and *de die in diem* until its termination. Further I consider that we should put a liberal construction upon the law of procedure in favor of an accused person whose mouth is closed and whose liberty may, in any given case, be sworn away by an unscrupulous and remorseless enemy; and that the cause of justice demands, unless otherwise clearly restricted in its requirements, that the fullest opportunity be given to a criminal to lay his whole case before a Court which tries him.

To assign to Section 253 the meaning which the Magistrate attaches to it, is to proclaim not a liberal but (as it appears to me) a harsh and unreasonable construction, and to allow a Magistrate to deal according to his individual discretion with applications on behalf of prisoners to have witnesses summoned without asking for more during the pendency of a summary trial proceeding *de die in diem* seems to me to be fraught with danger to the liberty of the accused, and to be altogether inexpedient. Even when a case is closed and a Magistrate is about to deliver his judgment, should a witness for the defence whose attendance has been anxiously expected arrive, and such witness be tendered for examination, I should consider it incumbent on that judicial Officer to take his evidence; and I am unwilling to believe in the possibility of such evidence being rejected on the ground of discretion. In every case the object should be to arrive at the truth, to enquire fully for that purpose, and then to deal out justice between the parties.

On the whole, then, I am of opinion that Mr. Cowell's contention is well founded,—that the prisoners were entitled to have subpœnas issued upon the witnesses named on the 12th January.

I hold that according to the true construction of Section 253 the Magistrate has erred in refusing to summon the witnesses named on the 12th January, and that the Magistrate, assuming he had the discretion he believes he had, has exercised that discretion unwisely and to the prejudice of the prisoners. I would therefore re-open the case, and order the Magistrate to allow the prisoners to complete their unfinished defence.

There is a special feature in the present case which I have not prominently noticed. It is this,—the case for the prosecution as originally made was not complete and had to be supplemented by fresh evidence which was adduced at an adjourned hearing held at or about the 28th December. It is not likely that the prisoners, when called upon to state their defence on the 31st December, should have been able to give the names of all persons whom they might be able to call to rebut the further case made by the prosecution, and it is highly probable that subsequent enquiry brought to light the names of the other witnesses mentioned on the 12th January as persons who were able on their oath to answer the supplemental case put forward by the prosecutor.

If the matter complained of lay in the discretion of the Magistrate, I can hardly conceive a more incorrect and mistaken exercise of such discretion as is evidenced by his refusal to comply, under the circumstances of this case, with the demand of the prisoners which forms the subject of this appplication.

I regret much that I differ from my learned colleague whose experience of the working of the Criminal Procedure Code is so much greater than my own. Constituted as the High Court is, my views in criminal cases must absolutely give way to the opinion of the Senior Judge, and the result is that the judgment of my colleague will prevail and be the judgment of the Court. I have consequently the satisfaction of knowing that if my judgment is erroneous, it will, by reason of its being inoperative, be wholly innocuous.

The 29th July 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Public servant—Omission to give information — Section 176, Penal Code.

(Miscellaneous Case).

Phool Chand Brojobassee, *Petitioner.*

Baboo Mohinee Mohun Roy for the Petitioner.

Section 176 of the Penal Code applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation.

Kemp, J.—WE think the petitioner has been illegally convicted in this case. It

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appears that the Sub-Registrar in looking over his registry had cause to suspect an old document dated the 9th Magh 1262. Upon this, without any documents being before him for registration, and as admitted by the Magistrate, contrary to the provisions of the Registration Act, the Sub-Registrar called upon the petitioner before us to appear before him on a certain date with the aforesaid kobalah to give his izahar. It appears that the petitioner did not appear. Steps were then taken to prosecute him before the Magistrate, and the Magistrate has eventually convicted him under Section 176 and sentenced him to one month's simple imprisonment. We think that this conviction is illegal and that the sentence must be quashed. It is clear that the petitioner was not legally bound to give any notice or to furnish any information on any subject to the Sub-Registrar, and it is for omissions to give notice or information to public servants by persons bound to give such notice and furnish such information that the Section applies. It applies to persons upon whom an obligation is imposed by the law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation. Now there was no obligation whatever on the petitioner to furnish any information in the matter of this kobalah to the Sub-Registrar. The Sub-Registrar appears to have had his curiosity excited by some suspicious entries in his Registry books, but the steps which he took appear to be altogether illegal.

The conviction and sentence must be quashed and the prisoner discharged.

The 31st July 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

Procedure—Evidence—Recording of depositions—Drunkenness.

Committed by the Magistrate and tried by the Sessions Judge of Patna, on a charge of grievous hurt and abetment of the same.

The Queen *versus* Zoolfkar Khan and others, *Appellants.*

It is the duty of a Judge to take care that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the Jury any evidence save that which has been legally put in, in the particular case which is under trial.

Evidence which has been put before the Magistrate, if used at the Sessions in two separate trials, should be noted by the Judge as having been put in, and the deposition ought to be taken from among the proceedings before the Magistrate and placed with the record first of the one case and then of the other of the cases in the Sessions Court,—a memorandum of its removal from each record being made.

The depositions of witnesses should be recorded in the first, and not in the third, person.

Drunkenness does not in the eye of the law make an offence the more heinous, though it is no excuse; and an act which if committed by a sober man is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused.

Macpherson, J.—THE case against Zoolfkar Khan has been so carelessly and badly tried that the conviction and sentence must be set aside and a new trial had.

It appears that Kumroo Khan, Guldadh Khan, Dyanath and others, on the one side, had a regular fight with Zoolfkar Khan and others, on the other side,—both parties using swords and *latties* freely. Dyanath received a sword wound of which he subsequently died: and Zoolfkar Khan also received very serious injuries.

The matter having been taken up by the Magistrate, Kumroo and Guldadh were committed for trial in respect of the injuries done to Zoolfkar, while Zoolfkar was committed for trial charged with causing the death of Dyanath. Their separate commitment in this manner was quite regular and in proper form.

The Sessions Judge first tried Kumroo and Guldadh; and the whole matter having been fully gone into, the Jury found them guilty (under Sections 326 and 109 of the Penal Code) of abetting the causing of grievous hurt to Zoolfkar, being armed with weapons of offence, &c.

As soon as their trial was over, Zoolfkar was put on his trial charged with causing the death of Dyanath, causing grievous hurt to him, &c. The Jury was composed of the same persons who had just tried the case of Kumroo and Guldadh; and the Judge seems to have considered that all the evidence taken in the first trial was to be deemed as imported bodily into the second, and might be fairly used as evidence against Zoolfkar. The result is that the record of the case against Zoolfkar, taken by itself, contains absolutely no evidence of the death of Dyanath or of grievous hurt to Dyanath caused or abetted by the prisoner. The Judge in his summing up to the Jury treated the evidence which had been taken in the first case as evidence against Zoolfkar and the Jury, also treating

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it as such, found him guilty of abetting the causing of grievous hurt &c. to Dyanath.

Kumroo and Guldadh and Zoolfkar were thereupon on their several convictions sentenced to rigorous imprisonment for five years each. And now they have filed a joint appeal to this Court.

It is impossible to say that the trial of Zoolfkar has been properly conducted, or that there was any evidence whatever before the Jury of the offence of which he has been convicted.

It may be that if the evidence which had just been taken in the first case had been repeated in the second, there would have been ample evidence to support a conviction. But the knowledge that this may be so is not enough. There is no evidence at all on the record as it stands; and if the evidence necessary to support the conviction of Zoolfkar is imported from the record of the case against Kumroo and Guldadh, it is evidence given behind the back of Zoolfkar,—evidence given by witnesses in his absence, whom he has had no opportunity of cross-examining. The irregularities which have been committed are most serious and patent.

It is the duty of a Judge to take care that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the Jury any evidence save that which has been legally put in in the particular case which is under trial.

The Judge in the case against Kumroo and Guldadh alludes to the evidence of Dr. Jackson, but there is nothing to show that that evidence was formally put in in either of the trials in the Sessions Court It ought to have been expressly noted by the Judge that it was put in; and the deposition ought to have been taken from among the proceedings before the Magistrate and placed with the record first of the one, and then of the other, of the cases in the Sessions Court,—a memorandum of its removal from each record being made.

The Judge in his summing up told the Jury that drunkenness in the eye of the law makes an offence the more heinous. There is no authority for such proposition, and all that the Judge should have said was that drunkenness is no excuse, and that an act which if committed by a sober man is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused.

The Judge has taken down the evidence of the witnesses, for the most part, in the third person. This causes much awkwardness and confusion, and must waste a good deal of the time of the Judge himself. The ordinary and proper and convenient way of recording evidence is to take it down in the first person,—exactly as spoken by the witness.

As regards Kumroo and Guldadh, the conviction and sentence will stand, and their appeal is dismissed.

The conviction of Zoolfkar and the sentence passed on him are set aside and a new trial is ordered.

The 4th August 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

False evidence—Sanction to prosecution—Section 191. Penal Code—Section 169, Code of Criminal Procedure.

Committed by the Magistrate and tried by the Sessions Judge of Sarun, on a charge of giving false evidence.

The Queen *versus* Mahomed Hossain, *Appellant.*

Messrs. G. Gregory, R. T. Allan and *Moonshee Mahomed Yusuff* for the Appellant.

The words of Section 191 of the Penal Code are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within that Section if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly knowing it to be false and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true.

The object of the sanction required by Section 169, Code of Criminal Procedure, is to ensure that the prosecution should be instituted after due consideration on the part of the Court before whom the false evidence was given or on the part of a Court to which such Court is subordinate.

Where a Magistrate perused the paper of a case which had been forwarded to him by a Subordinate Magistrate for consideration, and then sent on the papers to the District Superintendent of Police with an opinion adverse to the prisoner, and the District Superintendent of Police requested the Magistrate to issue a warrant against the prisoner charging him with giving false evidence, it was held that the issue of the warrant was a sufficient sanction under Section 169 on the part of the Magistrate.

Macpherson, J.—It appears to us that the conviction in this case must stand.

The prisoner has been convicted of giving false evidence in a judicial proceeding, under

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Section 191, and has been sentenced under the first Clause of Section 193 of the Indian Penal Code. The false evidence which he is said to have given is substantially this,—that in the course of a certain trial which was going on before the Deputy Magistrate, the prisoner, who is a head constable of Police, deposed that he arrived at noon at Bausdeelah Chuck, and that he sent Suroop and Piroo to arrest certain persons who were brought in two or three hours afterwards. It is alleged for the prosecution that the statement so made by the prisoner was wilfully false; that he in fact did not arrive at Bausdeelah Chuck until long after noon; and that he did not send out Suroop or Piroo to make the arrest in question, and that he was not present when the persons arrested were first brought in. The case for the prosecution is that Piroo went out by himself from the Sudder Station and arrived at Bausdeelah Chuck at about noon and made the arrests spoken of by the prisoner, and that it was not until some hours afterwards that the prisoner (the present appellant) appeared at Bausdeelah.

The lower Court has found that the appellant did make the statements charged, and that in making them he intentionally gave false evidence.

In appeal it is contended, in the first place, that is not proved on the evidence that the statement made by the appellant was false in fact. As to this we see no reason to differ from the Judge in the conclusion at which he has arrived. There is, no doubt, considerable conflict in certain parts of the evidence; but we are not prepared to say that we have any substantial doubt that the conclusion which the lower Court has arrived at is right.

Then it is said that the making the false statement does not constitute an offence under Section 191, because the matter was absolutely immaterial to the question which was at issue in the suit in which it was given, and because it did not appear that the prisoner had any thing to gain by making this false statement. But there is a very apparent reason why the prisoner should have made that statement knowing it to be false, even although it did not affect the merits of the case which was under trial at the time he made it. The reason is this, that he wished to shield himself from the charge of neglect of duty, by making it appear that he had proceeded early in the day to Bausdeelah Chuck, and had himself superintended and taken part in the proceedings which occurred there in the early part of that day. There was a very distinct reason why the prisoner should consider that it was for his interest to make it appear that he was there at noon. He wished to make it appear to his superior officers that he had done his duty well.

The words of Section 191 are very general and do not contain any limitation that the statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within that Section if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly knowing it to be false and with the intention of deceiving the Court, and of leading it to be supposed that that which he states is true. No doubt, there must be a corrupt intention at the time the false statement is made, but here I think it clear that there was a corrupt intention on the part of the prisoner, although the intention was not corrupt *quoad* any matter in issue in the particular suit in which he was being examined as a witness.

If I had any doubt as to the intention of the prisoner to make this false statement,—that is to say, if I thought it was possible to explain away what occurred on any theory of his having spoken carelessly and without any intention of leading the Court to believe that he was there at the time mentioned,—then I should say that the offence was not committed. Unless there was the distinct intention that the false statement should be believed and should deceive, it does not appear to me that the offence would have been committed. There is a great difference betweeen a statement which is immaterial to the matter in issue and is made inaccurately, and even perhaps falsely, without any special intention of deceiving, and a statement which is immaterial but which, being false, is made with the direct and express intention of deceiving.

It is objected that no sufficient sanction was given to the prosecution in this case. The sanction which has been given appears to me to be sufficient, though possibly not formal. The Deputy Magistrate, being much dissatisfied with the manner in which the prisoner and other constables appeared to have conducted themselves, sent the record of the case (in the course of which the prisoner gave the false evidence out of which this appeal arises) to the Magistrate, calling his attention to their conduct, and requesting the Magistrate, if he also condemned the conduct of the prisoner, to request the District Superintendent of Police to punish him. The Magistrate sent on the proceedings to the District Superintendent of Police after having perused them, and at the same time expressed a strong opinion that the conduct of the prisoner was extremely discreditable, adding,

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"I hope you will pass suitable orders on it. "I think, for many reasons, it would be ad- "visable to move this man to some distant "out-post." The District Superintendent of Police, thereupon, instituted enquiries, and subsequently wrote to the Magistrate saying that having enquired into the matter he thought that there was sufficient ground to institute a proceeding against the prisoner for giving false evidence: and the District Superintendent of Police in that letter requested the Magistrate to issue a warrant against him. The Magistrate, thereupon, did issue the warrant which is the foundation of the present proceedings.

It appears to me that under the circumstances the prosecution was sufficiently sanctioned within the meaning of Section 169 of the Code of Criminal Procedure. The Magistrate had himself considered the proceedings, and the Magistrate's Court is the Court to which the Court of the Deputy Magistrate is subordinate. Looking at the circumstances under which the case had been brought to the notice of the Magistrate, and bearing in mind that the Magistrate had himself considered it before he passed it on to the District Superintendent, and that the District Superintendent of Police had requested the Magistrate to issue a warrant, it appears to us that the issuing of the warrant must be taken to have been accompanied with a sufficient sanction on the part of the Magistrate. The object of the sanction required by Section 169 is to ensure that the prosecution shall be instituted after due consideration on the part of the Court before whom the false evidence has been given or on the part of a Court to which such Court is subordinate. I think that in the present case this object was fully attained: and therefore that this ground of appeal also fails. The conviction and sentence must be affirmed, and the appeal is dismissed.

Ainslie, J.—I concur.

The 5th August 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Criminal breach of trust—Procedure—Dismissal of charge—Section 67, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Hooghly.

Isser Chunder Ghose,

versus

Peari Mohun Palit.

Baboo Opender Chunder Bose for Peari Mohun Palit.

To constitute the offence of criminal breach of trust there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged.

Per Glover, J.—Where the Criminal Procedure Code makes it necessary for a Magistrate before dismissing a charge to examine both the complainant and his witnesses, it supposes that there has been already a *primâ facie* case made out; and where the complainant makes out such a *primâ facie* case, the Magistrate is bound first to examine all the complainant's witnesses before dismissing the charge; but in a case where there is clearly no *primâ facie* case established, the Magistrate is justified in acting under Section 67 of the Code of Criminal Procedure and in dismissing the case at once.

Kemp, J.—We think that the order of the Deputy Magistrate in this case is legal and proper. The opposite party Isser Chunder Ghose charged Peari Mohun Palit with criminal breach of trust under the provisions of Section 409 of the Penal Code. From the statement it appears that Peari Mohun Palit is the general mooktear as well as the manager of the estate of Isser Chunder Ghose. Isser Chunder Ghose states that a sum of rupees 28-4 annas had been deposited by the ryots of the estate under Act VI of 1862, Bengal Council; and further that there was a sum of rupees 1,127 deposited to his credit in the Collectorate on account of execution of decrees; that this sum had been received by Peari Mohun Palit, but that out of it he had only paid to Isser Chunder Ghose rupees 700;

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and therefore a charge is made against Peari Mohun Palit that he has committed criminal breach of trust with reference to the balance, namely, rupees 455-4 annas. Isser Chunder Ghose was examined by the Deputy Magistrate and a challan was produced by him. The Deputy Magistrate then dismissed the case on the ground that he did not think the matter cognizable by him, and observing that from an inspection of the challan it appeared that the word "বাবদ" which means "out of" was used, and that from that fact it was clear that Peari Mohun Palit had remitted on account a certain sum of money, detaining the rest, not dishonestly, but as manager and general attorney of complainant. Now to constitute the offence of criminal breach of trust there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. We think that there has been no such dishonest appropriation in this case. It is clear that Peari Mohun Palit in virtue of his office as manager and general mooktear of Isser Chunder Ghose drew out certain sums from the Collectorate, from which he remitted the sum of 700 rupees odd to his employer. From the terms of the challan it is clear that he remitted this money *on account*, and if there is any money still in his hands he will have to account for that to the plaintiff in the usual manner in the course of business. We think that this was a case in which with the challan before him, the Deputy Magistrate was justified in not sending for further evidence and in disposing of the case as he has done. We see no reason whatever to interfere, and order that the papers be returned.

Glover, J.—I wish to add a few words to the effect that where the Act makes it necessary for a Magistrate before dismissing a charge to examine both the complainant and his witnesses, it supposes that there has been already a *primâ facie* case made out; and where the complainant makes out such a *primâ facie* case, no doubt the Magistrate would be bound first to examine all his, the complainant's, witnesses before dismissing the charge; but in this case there was clearly no *primâ facie* case established against Peari Mohun Palit. On the contrary, as Mr. Justice Kemp has shown, it is quite clear from the very paper itself on which the complainant bases his charge that no charge of criminal breach of trust could be maintained—and under these circumstances, the Magistrate was justified in acting under Section 67 of the Code of Criminal Procedure and in dismissing the case at once.

The 7th August 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Transfer of case—Complainant's evidence—Sections 26 and 30, Code of Criminal Procedure.

(Criminal Motion.)

Grish Chunder Ghose and others, *Petitioners.*

Mr. M. L. Sandel and *Baboo Umbica Churn Bose* for the Petitioners.

A Magistrate cannot refer a case to a Deputy Magistrate unless he has, under Section 66 of the Code of Criminal Procedure, reduced the examination of the complainant into writing; nor can he himself try a case once transferred to a Deputy Magistrate without formally recalling the case under Section 30.

Glover, J.—We are very unwilling to interfere with the orders passed in the Courts below, because the investigation appears to have been very carefully and thoroughly made and the evidence is full and satisfactory. There can, however, be no doubt that the Magistrate has in more than one particular contravened the provisions of the Code of Criminal Procedure, and we have no choice but to quash his proceedings as illegal.

In the first place he did not record the complainant's statement before referring the case to the Deputy Magistrate, as he was bound to do under Section 66 of the Code. There is an order on the back of the petition making over the case, but no examination of the complainant "reduced into writing and signed by the complainant and the Magistrate."

In the cases of Dulali Bewah *versus* Bhoobun Shaha and of the Queen *versus* Mohima Chunder Chuckerbutty* it has been decided that such a departure from the rules of procedure makes the acts of a Magistrate illegal.

The appellant further contends that the Magistrate, having once made over the case to the Deputy, could not try it himself without formally recalling the case from the lower Court under Section 30.

* 15 W. R., Criminal, p. 45.

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The point has been ruled in Shanto Tearnee *versus* Mrs. Belilias and others* and should, I think, be given in favor of the appellant in this case.

There are other questions of law raised ;—one that, as regards Rowshun Ali, part at least of the evidence against him was not recorded in his presence ;—another that several witnesses whom the accused wished to call were not summoned.

We do not see any thing on the record that would substantiate the last objection ; and had it been a true one, it would have been made, we should suppose, to the Judge when the appeal was before him.

The first is however at least partly correct, as the record itself shows.

As, however, it appears that the conviction must be quashed on the two first objections taken, it will be unnecessary to direct further enquiry as to the second.

The appellants must be discharged.

The 26th August 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Mookhtear — Moral turpitude — Act XX of 1865.

In the matter of Koylash Nath Chowdhry, Mookhtear.

Case of a Mookhtear who was reinstated by the High Court to his practice after suspension by reason of his having been convicted in two cases, the circumstances of these cases not showing that the Mookhtear was guilty of any moral turpitude or that he was unfit to act in the Criminal Courts as a Mookhtear.

Ainslie, J.—On the 21st of November 1870, Koylash Nath Chowdhry applied to the Deputy Magistrate and Deputy Collector of Diamond Harbour for permission to practice as a Mookhtear and Revenue Agent in his Court. The Deputy Magistrate finding that the applicant had been convicted in two several cases,—in one case of wrongful confinement of a ryot and in the other case of abetting the illicit manufacture of salt,—reported the matter on the 26th of November to the Magistrate and Collector, and a report having been made by the Collector to the Commissioner and the Board of Revenue, an order was made removing the petitioner's name from the rolls of Revenue Agents, but the Board of Revenue did not proceed under Section 31 Act XX of 1865 to make any report to this Court with the view of having the petitioner removed from the rolls of Mooktears. Subsequently, the matter having been brought to the notice of the District Judge, that Officer on the 22nd of May 1871 reported the matter to this Court for orders, forwarding copies of the judgments in the two cases in which the petitioner was convicted, and stating that in his opinion neither of these cases fell within the words of Section 15 of Act XX of 1865, namely, "fraudulent or grossly improper conduct in the discharge of his duties, or other reasonable cause." The Judge then proceeds to say that the Board may have proceeded under the provisions of Section 26 which refers to any criminal offence, but that the nature of the charges of which he has been convicted would not justify him in saying that he is not fit to be a Mookhtear, whether he considered the words of the law above quoted or the absence of any thing in these cases tending to show that he is not fit to be employed as a fiduciary agent.

We have gone through the judgments in the two cases in which the petitioner was convicted, and we find, in the case of wrongful confinement, that the Deputy Magistrate sentenced the petitioner to a certain term of imprisonment with a fine of 25 rupees in addition. The Judge, however, on appeal was of opinion that the offence was one of such a character as not to call for punishment by imprisonment at all. He accordingly modified the sentence and substituted a fine. It appears to us that this was a case without circumstances of aggravation ; that there was no moral turpitude to be imputed to the petitioner in respect of the act for which he was punished ; and that the Judge is right in saying that it does not show that the petitioner is unfit to be employed as a Mookhtear.

The other conviction was for an offence against the Revenue Laws. It may be doubted whether this was an offence which comes within the definition of the words "Criminal offence" as used in Section 14, but whether that is so or not we think, from the circumstances as disclosed in the judgments, that there can be very little doubt that the

* 12 W. R., Criminal, p. 58.

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manufacture of salt had been habitually carried on, and that it was not started by this petitioner who, for a short time, was acting as the Naib of the Zemindar. It appears to us that the petitioner was careless in allowing the continuance of a breach of the Revenue Laws, but that there is nothing in the act which implies such depravity that we can say that he is a person who ought not to be trusted to represent another in the Criminal Courts as a Mookhtear, especially when we find that for 18 years this man has been acting as a Mookhtear, and that no charge of dishonesty or misconduct in respect of his professional duties has been brought against him. The suspension has already continued for 9 months, and we think that the petitioner ought now to be allowed to resume his practice.

The 2nd September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Assault—Punishment—Fine—Imprisonment—Sections 65 and 352, Penal Code.

(Miscellaneous Case.)

Jehan Bucksh and another, *Petitioners.*

Baboo Ashootosh Dhur for the Petitioners.

In a case of assault, a sentence inflicting a fine of 50 rupees and awarding imprisonment for one month in default of payment of the fine is illegal, with reference to Sections 65 and 352 of the Penal Code.

Ainslie, J.—In this case Jehan Bucksh and Kader Bucksh have petitioned the Court under Section 404 of the Code of Criminal Procedure to revise the orders of the Joint Magistrate of Dacca passed on the 15th of August 1871. The case of Jehan Bucksh was before this Court in May last. It appeared that he, having been previously bound down to keep the peace in recognizances to the extent of 500 rupees, was convicted by the then Joint Magistrate of Dacca and fined 10 rupees for an assault, and that at the same time his recognizance was forfeited. The Court was then of opinion that Jehan Bucksh ought to have had an opportunity of examining witnesses in support of the cause shewn against the forfeiture of the recognizances, and that the original trial having been very imperfect the best course would be to set aside the conviction and direct the Magistrate to hear the case *de novo* taking all the evidence tendered by the petitioner. The Magistrate has now convicted Jehan Buckah again and fined him 50 rupees which has been paid. A question has been raised whether that conviction and sentence is legal and proper. With reference to the case of this petitioner the papers will be called for.

The other petitioner who was also sentenced to a fine of 50 rupees and to imprisonment for one month in default of payment seems to have been put on his trial since the case went back from this Court. With reference to him it is contended that as Section 352 of the Penal Code limits the imprisonment that can be awarded to a term of three months, and as by Section 65 of the Code imprisonment in default of payment of a fine cannot exceed one-fourth of the term of imprisonment, which is the maximum term of imprisonment fixed for the offence, if the offence is punishable by imprisonment as well as by fine, therefore this order is illegal. The prisoner has already, it would appear, been 17 days in jail, and as the sentence is manifestly contrary to the provisions of the law, we think it proper at once to amend it and direct that the imprisonment shall be reduced to 21 days. We also direct that the proceedings which are said to be pending for the forfeiture of the recognizances entered into by Jehan Bucksh be stayed until further orders.

The 2nd September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Kidnapping—Cheating by false personation—Sections 366 and 419, Penal Code.

The Queen *versus* Mohim Chunder Sil, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Dacca on a charge of Kidnapping, &c.

Baboos Doorga Mohun Doss, Ishur Chunder Doss and *Preonath Banerjee* for the Appellant.

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There can be no conviction of the offence of kidnapping under Section 366 of the Penal Code, unless it is proved that the accused has taken the girl out of the keeping or custody of her lawful guardian without her consent.

Where the accused represented to the prosecutor that a girl was a Brahmin and thereby induced him to part with his money on consideration of the marriage of the girl to his brother, when the girl really was of the Sudra caste, it was held that he was guilty of cheating by false personation under Section 416 of the Penal Code.

Kemp, J.—THE prisoner in this case has been convicted under Section 366 and Section 420 of the Indian Penal Code. We think that the conviction on the first Section cannot stand. Kidnapping is defined in Section 361 as follows:—"Whoever takes or entices any "minor under fourteen years of age if a male, "or under sixteen years of age if a female, or "any person of unsound mind, out of the keep-"ing of the lawful guardian of such minor, or "person of unsound mind, without the con-"sent of such guardian, is said to kidnap such "minor or person from lawful guardianship." Therefore the offence consists in taking a minor out of the keeping of his lawful guardian without the consent of such guardian, and in this case there is no evidence whatever that the prisoner did take the girl out of the keeping or custody of her lawful guardian without her consent.

On the 2nd charge we think that the contention of the pleader is without any force whatever. Under Section 416 cheating by personation is defined as follows:—"A person is said to cheat by personation if he "cheats by pretending to be some other per-"son, or by knowingly substituting one per-"son for another, or representing that he or "any other person is a person other than he "or such person really is." Now here there is no doubt that the prisoner did represent to the prosecutor that the girl was a Brahmin girl and thereby induced him to part with his money on consideration of the marriage of the girl to his brother, when the girl really was of the Sudra caste, and we think that the offence under this Section is made out.

We quash the conviction under the first named Section, namely, Section 366; but the conviction under Section 420 and the sentence of five years' rigorous imprisonment passed under that Section will stand. The further sentence of 5 years' rigorous imprisonment under Section 366 is annulled.

The 11th September 1871.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Charge — Witness — Fine — Section 283, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya.

The Queen *versus* Jehangeer Buksh Khan and others.

A Magistrate should himself state distinctly what charge an accused person has to meet, and ought not to leave that to his amlah.

A person who is called as a witness by the Court cannot be convicted and fined under Section 283 of the Penal Code.

Macpherson, J.—THE conviction of the three petitioners and the sentences passed upon them are set aside; and the fines, if they have been paid, must be at once refunded to them.

The proceedings before the Assistant Magistrate were most loosely and irregularly conducted, and clearly must be quashed. It was the business of the Assistant Magistrate himself to state distinctly what the charge was which the accused had to meet, and he had no right whatever to leave it to any of his amlah to say under what Section the accused were being proceeded against.

It would appear from the record that two of the petitioners, Doorga Singh and Mode Singh, were actually first examined as witnesses and then convicted and fined under Section 283 of the Penal Code. The Assistant Magistrate records the evidence of Doorga Singh, describing him as "first witness called by the Court," while he describes Mode Singh as "2nd witness for Court."

How, after being called by the Court as witnesses, they came to be convicted, or how, if they were on their trial, the Assistant Magistrate came to call them as witnesses, is quite inexplicable.

We may add that a person does not become a witness for the Court merely because the Court and not the parties call him to give evidence: and that the expression "witness for Court" is alike incorrect and improper.

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The 9th September 1871.

Present :

The Hon'ble F. B. Kemp and W. Ainslie,

Judges.

Procedure—False charge—Sectiosn 180 and 240, and Chapter XIV, Code of Criminal Precedure—Section 211, Penal Code.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Hooghly.*

The Queen *versus* Gour Mohun Singh.

Under Section 249, Act VIII of 1869, which extends the provisions of Section 180 to trials of offences under Chapter XIV, a Deputy Magistrate may dismiss a complaint under that Chapter without calling evidence, if in his judgment there is no sufficient ground for proceeding under it.

Under the circumstances of this case, however, the High Court considered that the Deputy Magistrate should have made enquiries before charging the complainant with making a false charge under Section 211, Penal Code.

Reference.—THE petitioner first applied to the Police accusing certain persons of having committed theft. The Police enquired into the case and reported that the case was a false one. Petitioner pending the enquiry applied to the Deputy Magistrate calling the acts of the Police in question, and asking for the Deputy Magistrate's personal investigation into his complaint. The Deputy Magistrate took up the petition with the Police Report, and summoned petitioner on a false complaint under Section 211, without taking any evidence on petitioner's behalf.

It seems to me that this proceeding was illegal. Under the High Court Rulings quoted in the margin,* the Deputy Magistrate was bound to take the evidence of the witnesses of the complainant respecting the matter which he charged against the accused, inasmuch as it was a charge cognizable under Chapter XIV of the Code of Criminal Procedure ; and until he had done so and found the charge to be unsustained, he was not justified in dismissing petitioner's case and instituting proceedings against him under Section 211, merely upon the Police Report. It is observable that the petitioner imputed *mala fides* with respect to the Police proceedings, and therefore it was the more necessary for the Deputy Magistrate to allow petitioner an opportunity of establishing his charge against the persons accused before he summarily entertained the Police account of the matter that it was a false charge. The order of the Deputy Magistrate appears to be illegal, and therefore I think it ought to be set aside.

*7 W. R., p. 47.
2 W. R., p. 47.

The case does not require any explanation from the Deputy Magistrate.

Judgment of the High Court.

Kemp, J.—The rulings quoted by the Judge were passed before Act VIII of 1869 came into operation. Under Section 249 of Act VIII, the provisions of Section 180 have been made applicable to trials of offences under Chapter XIV.

In this case the petitioner charged a number of people with dacoity. During the Police enquiry the petitioner became dissatisfied with the proceedings of the Police charging them with partiality. He applied to the Deputy Magistrate to proceed to the spot in person and to examine the witnesses adduced by the prosecutor. The Deputy Magistrate took no action in the matter, but waited the report of the Police. The Police reported the charge as false, and the Deputy Magistrate, without taking any evidence or making any further enquiry, has directed the petitioner to be tried for an offence under Section 211.

We think that although under Section 180, the Deputy Magistrate was competent to dismiss the complaint if in his judgment there was no sufficient ground for proceeding in it, that this was a case in which the Deputy Magistrate ought to have made some enquiry to satisfy himself that the proceedings of the Police were not, as stated by the petitioner, partial and improper, before charging the petitioner under Section 211. We direct the Deputy Magistrate to proceed with reference to the above remarks.

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The 9th September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Punishment — Rioting — Criminal force to public servant—Sections 147 and 353, Penal Code.

(Miscellaneous Case.)

Nilruttun Sein and others, *Petitioners.*

Baboo Mohinee Mohun Roy for the Petitioners.

Where the accused were convicted under Section 147 of the Penal Code of rioting and also under Section 353 of using Criminal force to a Constable who went to arrest them, the High Court set aside the conviction under the former Section.

Ainslie, J.—In this case certain parties, the applicants before us, were convicted by the Assistant Magistrate of Goalundo, and sentenced under Sections 147 and 353 to three months' imprisonment under each Section. The facts of the case appear to be that there was a dispute between certain zemindars, owners of two hauts; that one party had applied to the Police for assistance and a Constable was deputed to prevent a breach of the peace. This Constable sent over a Chowkeedar to ascertain what was being done in the rival village and received information that men were assembled there. Thereupon he proceeded to that village and says that he found a number of people assembled and armed with sticks in a certain house, and that when he was about to arrest them they resisted him by force and beat him. The evidence has been believed by the Assistant Magistrate and also by the Judge to whom an appeal was preferred. The case comes before us under Section 404 of the Criminal Procedure Code, and the first point of law which is taken is that the two offences constitute substantially parts of one and the same offence, and a variety of cases have been cited in support of this view. Among these the cases in Vol. VII, Weekly Reporter, page 13, and Vol. X, Weekly Reporter, page 63, Criminal Rulings, may be elected as the most prominent. It was also urged by the learned Counsel for the petitioners that the Assistant Magistrate had convicted the prisoners of being members of an unlawful assembly in having come together with arms with the common object of making a violent attack upon the rival village, and that the conviction on the 2nd count must stand or fall with that on the first count; but as it appears that the conviction is of rioting, that is of some overt act over and above the mere unlawful assembly, it is clear that the Magistrate was dealing with an offence which arises out of no other act except than that for which a separate punishment has been awarded under Section 353; but even if it were otherwise, we think that the two offences do not necessarily stand or fall together; for by Clause 1 Section 99 of the Penal Code, the attack on the Constable would not be justified by any mistake made by him in his duty. On the authority of the cases cited, we think that the first punishment must certainly be set aside. We think that there are no grounds for interfering with the sentence under Section 353. The orders of the Assistant Magistrate are modified accordingly.

The 16th September 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Procedure — Breach of the Peace — Agent—Section 318, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Rajshahye.

Coomar Poresh Narain Roy, *Petitioner.*

Baboo Mohinee Mohun Roy for the Petitioner.

Before proceeding to bind parties to keep the peace, summonses should be duly issued to the witnesses, who should be examined *in the presence of the parties.* The accidental presence of any agent is not, legally speaking, such presence before which an examination is legally sufficient.

Reference.—From the record of this case it appears that on the 6th May 1871, the Officiating Joint Magistrate recorded the evidence of Jogonath Tewarie, Sub-Inspector of Police at Bilmaria, who stated that there was a dispute between the zemindar Poresh Narain Roy and the manager of Rajapoor Factory, and asked that proceedings might be taken under Section 318 of the Criminal Procedure and meanwhile a heavy bond might be taken from both parties to prevent a breach of the peace. The Joint Magistrate on the same day, under the provisions of Section 282 Cri-

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minal Procedure, ordered summons to issue against both parties to give security bonds for rupees 5,000 each or to shew cause. On the 22nd May the same Sub-Inspector deposed again before the Joint Magistrate that he had been directed to make fresh enquiry into the matter, and found that Messrs. Watson and Co. are actually in possession of the land having no special force of armed men and they collected the rents; and that Poresh Narain Roy has set up a new cutchery and has 8 armed men there, and also 4 armed men at another place to assist in collecting rents on the land where Messrs. Watson and Co. are in possession. He considered that if Poresh Narain Roy's people attempted to collect rent that Messrs. Watson's people would oppose them. He added that the District Superintendent had ordered him to request that the summons against the manager on part of Messrs. Watsons might be discharged and a heavy bond to keep the peace might be required from Poresh Narain Roy. On this the Joint Magistrate on the same day cancelled the summons against the manager of Rajapoor factory. He set aside his former summons on Poresh Narain Roy and ordered a fresh summons calling for a bond for rupees 20,000 to issue upon him. There is nothing to shew in his evidence from what source the Sub-Inspector obtained his information, *i. e.*, whether it was told him by others, or whether he had seen every thing with his own eyes, or whether both had become mingled together and hence his opinions had been formed. It does not appear that Poresh Narain's representative was in the Court on the 22nd May or was allowed to cross-examine the Sub-Inspector; and yet on that statement alone the Joint Magistrate proceeded to take the evidence of the witnesses on the part of Poresh Narain Roy and decided that a bond for rupees 20,000 must be taken. The decision of the Joint Magistrate rests mainly on the evidence of the Sub-Inspector. The evidence of Poresh Narain's witnesses shews that Messrs. Watsons formerly held the land in farm, and that they, the witnesses, now pay rent to Poresh Narain; but I do not see from their evidence that they say anything about a cutchery having been recently set up by Poresh Narain. However, be that as it may, it is evident that the case for the prosecution was comprised solely of the information of a Sub-Inspector which can only be considered as the credible information necessary under Section 282 to enable a Court to issue a summons, and the Joint Magistrate failed to follow the course prescribed in Section 287 which has been fully detailed in the Full Bench Ruling dated 13th September 1869.* In that Ruling, four Judges have decided that "a Magistrate can only be satisfied that there is occasion to bind a person to keep the peace after he has recorded evidence taken judicially before him in the presence of the person summoned, and who must have an opportunity given him of cross-examining the witnesses adduced by those on whose complaint the charge against him is brought forward."

In this case nothing of the kind has been done. As far as I can perceive from the record, the Sub-Inspector acted and made enquiry on complaint of others and the Magistrate trying the case was bound to call on those persons to appear and depose in the presence of the accused or his agent to the facts alleged by them. I am compelled to forward the records of this case, under the provisions of Section 434 Criminal Procedure Code, to the High Court, in order that the proceedings of the Joint Magistrate may be set aside and the order quashed. Before despatching the papers a copy of this order of reference will be forwarded to the Officiating Magistrate in order that he may furnish an explanation of the defect in his proceedings.

Having received the explanation of the Joint Magistrate, dated the 18th August, I am still of opinion that the record must be submitted to the High Court for the reasons already recorded by me. In order to explain my reasons I take the explanation furnished in detail.

1*st.*—I do not consider that there was any necessity to recall the Inspector a third time, but it was necessary that the persons from whom he obtained his information should be produced in Court and examined in the presence of the party called on to furnish security. I can in no way look upon the evidence of the Inspector as establishing the necessity for calling for the recognizance.

The evidence of the Inspector could only be founded on what he had heard from others and he was not the proper person to decide what portions of what he heard was credible and should be stated to the Court. The Joint Magistrate was bound to examine those persons himself and to decide on their evidence according to his own judgment.

2*nd.*—Whether breaches of the peace have subsequently taken place or not does not affect the legality of the proceedings of the Joint Magistrate, and I am still of opinion that his proceedings in the case should be quashed.

* 12 W. R., Criminal, p. 60.

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Judgment of the High Court.

Bayley, J.—The view taken by the Judge is perfectly correct. It is necessary that summonses should duly issue to the witnesses and they should be examined *in the presence of the parties.* The accidental presence of any agent is not, legally speaking, such presence before which an examination is legally sufficient. The Joint Magistrate's proceedings are quashed, as recommended by the Officiating Judge.

The 18th September 1871.

Present:

The Hon'ble G. A. Macpherson and F. A. Glover, *Judges.*

False evidence—Charge—Section 193, Penal Code.

The Queen *versus* Moharaj Misser and others, *Appellants.*

Committed by the Assistant Magistrate and tried by the Sessions Judge of Tirhoot on a charge of giving false evidence.

Mr. R. E Twidale and *Baboo Chunder Madhub Ghose* for Appellants.

It is wholly incorrect to charge a number of persons jointly, with intentionally giving false evidence under Section 193, Penal Code.

A charge under that Section should show what the statement is which the accused persons or any of them are alleged to have made, and it should disclose the exact date on which the offence charged was committed, and the Court or Officer before whom the false evidence was given.

Macpherson, J.—It is impossible that any of these convictions should be upheld.

The ten appellants were all tried together charged with giving false evidence under Section 193 of the Penal Code.

Six of them, *viz.*, Baijnath Misser, Imruth Misser, Kari Misser, Sarban Chowdhry, Brij Behari, and Loollah Dhanook, were included in one charge: the remaining four were the subjects of the other.

The charge against the six is "that you on "or about the —— day of June —— at "Tajpore committed the offence of voluntari-"ly giving false evidence in a stage of a judi-"cial proceeding, and that you have thereby "committed an offence under Section 193 of "the Penal Code, &c."

Now this charge is bad and defective in a variety of most substantial respects.

Firstly.—It is wholly incorrect to charge a number of persons jointly with giving false evidence. It may be that the statements which are said to be false were all made in the course of one particular trial and that they were all made in order to attain one particular end. Still each statement is made by one man only. However many statements to the like effect may be made by others, every man's statement is his own, and upon it, and upon it alone, must any charge against him stand or fall. The lie (if it be a lie) told by a witness is none the less his own particular lie because other witnesses have about the same time told similar lies; and it is each man's own lie, and not his neighbour's, that can alone be used against him or be the subject of a prosecution under Section 193. I do not mean to say that if the accused persons were properly charged, each in respect of his own particular false statement, the Sessions Court might not be justified in putting them up and trying them together. It may occasionally be convenient and proper that they should be so tried; but then the Court requires to be most careful in keeping the case of each prisoner distinct from that of the others and in seeing that the case against each is complete in itself in all its details.

Secondly.—The charge does not shew what the statement is which the accused persons, or any of them, are alleged to have made, and which is relied on as being false;—it does not set out distinctly the particular statement on which the prosecution is based. It has been decided over and over again by this Court that the charge under Section 193 must show on the face of it the statement which is alleged to be false: and it is manifestly unfair to the accused when this rule is not attended to.

Thirdly.—The charge does not disclose either the day of the month or the year on or in which the offence charged was committed. It was "on or about" some day in some month of June, but there is nothing to indicate *what* June, nor what day in what June.

Fourthly.—The charge does not indicate the Court or the officer before whom the false evidence was given. The only information given is contained in the words "in a stage of a judicial proceeding" and "at Tajpore," but what stage of what judicial proceeding

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does not appear. In the case of *Futtee Ali Biswas*, 10 W. R., 37, where the charge was far fuller and better than in the present instance, the Court said :—" We think it right " to remark here that in our opinion both " the charges made against the prisoner are " seriously defective in not specifying the " judicial proceeding in a stage of which the " prisoner is accused of having made the " false statement. We even think that the " particular stage of the proceeding ought to " have been mentioned. It is only fair to " the prisoner that the charge which is to " stand for ever against him should be made " as definite and specific as it reasonably can " be."

The six prisoners being arraigned upon this remarkably loose and general charge, pleaded not guilty. At the trial, their depositions taken by Mr. Forbes, the Assistant Magistrate of Tajpore, on the 17th of June 1871, in a stage of a criminal case which he was trying, were put in and proved. Evidence was given for the prosecution that the statements made by the prisoners were false, and that the case which they attempted to support was false. But the whole evidence is of a general nature: and it was in fact deemed enough to prove that the case tried by the Assistant Magistrate was wholly false, without entering into details as to the statements made by the present appellants respectively.

The commission of the offence of giving false evidence under Section 193 is not proved unless it is proved that the accused has intentionally made a particular statement which is shewn to have been false to his knowledge. In the six depositions which have been put in, and which were treated as shewing the false evidence with the giving of which the prisoners are charged, there are many statements which are probably true enough, and as to which there is certainly no evidence that they are false. The specific portions of these depositions which were relied on by the prosecution ought to have been picked out and proved expressly in detail to have been false, and the general evidence which has been given is insufficient.

On the whole, it appears to me that there are errors and defects both in the charge and in the proceedings on the trial which have prejudiced the prisoners, and I think that the convictions and the sentences passed on them should be set aside, and that they should be discharged.

The deposition of the other four appellants, Moharaj, Kali, Dariaow, and Umah Misser, is similar in all respects, except that the Assistant Magistrate has not attached to their depositions the memo. required by Section 199 of the Criminal Procedure Code, and there is nothing to show that they ever acknowledged their evidence to have been correctly taken down, except also that the charge against them states the day of the month (but not the year), and correctly speaks of the offence as being that of " intentionally" giving false evidence, instead of using the word " voluntarily" as in the other charge. The remarks I have made, as regards the six prisoners, apply almost equally to the other four: and I think that as to these latter also the convictions and sentences should be set aside and that they should be discharged

Glover, J.—I quite concur.

The 18th September 1871.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Procedure — Witnesses for prosecution—Section 193 and Chapter XV, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Monghyr.

Kishore Sahai *versus* Mungeri Sahai.

Section 193 of the Code of Criminal Procedure applies also to cases under Chapter XV of that Code, and a Magistrate cannot dispose of a case under that Chapter without examining the witnesses called for the prosecution.

Reference.—One Kishore complained against Mungeri Sahai for criminal trespass under Section 447, Indian Penal Code. The Deputy Magistrate, Moulvie Abdul Guffoor, issued his summons for the attendance of the witnesses for the prosecution as well as the defendant in the case.

They entered their appearance on the date fixed for the trial of the case, but the Deputy Magistrate dismissed the case without hearing the evidence of the witnesses named by plaintiff. He only heard the plaintiff and two other witnesses summoned by the Court, as also the defence of the accused.

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The order of the lower Court was that the case be dismissed and the defendant discharged (rehae).

The whole of the above order I consider to be opposed to Section 193, Criminal Procedure Code.

This case being under Section 447, Indian Penal Code, its trial comes under Chapter XV of the Code of Criminal Procedure. On the day fixed for the hearing of the case, the witnesses for the prosecution who were summoned were present. The Deputy Magistrate did not hear them, but examined two other witnesses to remove any doubt which he may have in the matter and dismissed the case.

Section 193, Criminal Procedure Code. which is applicable to cases triable under Chapter XII, has also been made applicable to trial of cases under Chapter XIV,—vide Section 249, Code of Criminal Procedure; and the dismissal of a case triable under these Chapters without hearing the evidence is illegal.

Now although the law is silent with regard to the application of Section 193 to cases under Chapter XV, Criminal Procedure Code, it must be considered, in taking a general view of the matter, that its provisions do apply to such cases, and therefore the Deputy Magistrate should have examined the witnesses named by plaintiff before passing a disposal order upon the case.

Judgment of the High Court:—

Macpherson, J.—It appears to us that the view taken by the Magistrate is correct. The order of the Deputy Magistrate is set aside; and the Deputy Magistrate will restore the case to his file and examine the plaintiff's witnesses and pass such further order in the case as may be proper.

The 23rd September 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Ex-parte statements — Transfer of case—Judicial Officer (Examination of).

(Criminal Motion.)

The Queen *versus* Mudhoo Soodun Roy, *Petitioner.*

The Legal Remembrancer for the Prosecution.

Baboo Ashootosh Dhur for the Petitioner.

Ex-parte statements made in the High Court by parties who invoke the aid of the Court to transfer a case from one authority to another, ought to be based upon truth.

Case in which the High Court permitted a Deputy Magistrate to be examined on behalf of a petitioner whose case was investigated by the Deputy Magistrate.

Kemp, J.—This is an application by Mudhoo Soodun Roy, moving this Court to transfer the record of a case pending in the Court of the Deputy Magistrate of Cynthea, in which the said Mudhoo Soodun Roy is the accused party, to the Court of the Magistrate of the 24-Pergunnahs or to such other Judicial Officer as this Court may think proper. On the 9th of September this Court directed the Magistrate of Beerbhoom to take this case up himself and to try it. Subsequently, on the 16th of September, the Legal Remembrancer appeared and moved the Court to stay its order. The Legal Remembrancer undertook on that occasion to show this Court that the petitioner was concerned in the abstraction of the record of the case. The Court upon this postponed the case to enable the Legal Remembrancer to substantiate his averment, and the opposite side who is represented by Baboo Ashootosh Dhur was called upon to appear, when the case again came on before the Court. The Legal Remembrancer has appeared to-day and has intimated to the Court that there is nothing in the proceedings of the local authorities in the matter of the theft of the nuthee to implicate the petitioner; that the party who has been convicted of the abstraction or theft of the record was one Pulluk Singh, who is a co-defendant of Mudhoo Soodun Roy in the original case, but there is nothing on the record to connect Pulluk Singh and the petitioner in the matter of the theft of the nuthee. Therefore the Legal Remembrancer has not been able to show to the Court that the petitioner was in any way concerned in the abstraction of the record.

We fully concur in the arguments of the Legal Remembrancer that, as a general rule, *ex parte* statements made in this Court by parties who invoke the aid of the Court to transfer a case from one authority to another ought to be based upon truth, and that when any indulgence is asked for from the Court on an *ex parte* statement, the party making that application should, to use the words of their

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Lordships of the Privy Council in the case quoted by the Legal Remembrancer, "speak the truth." The Legal Remembrancer has called the attention of the Court to certain passages in the petition of the applicant, which, he says, are not founded on truth. The first passage referred to by him was that contained in the 2nd paragraph of the petition, which says "that the record is missing." The Legal Remembrancer says that this is not a true statement, inasmuch as the petitioner must have known at the time he made that statement that the record had been stolen. The next statement which was referred to by the Legal Remembrancer as not true is to be found in the third paragraph of the petition, in which the petitioner says that "although the offence was bailable, the Deputy Magistrate did not fill up the amount of bail in the warrant, and accordingly the petitioner could not offer any bail at the time of arrest but was carried to Cynthea on the 31st Shrabun, and since then, owing to the petitioner being a stranger at Cynthea, he could not procure bail there and is kept in hajut." Then the Legal Remembrancer objected that this was not a case in which the Deputy Magistrate ought to be called upon to give his evidence, and he referred to a case in England, and also to Section 108 of the new Indian Evidence Bill which has not yet come into operation.

We think that with reference to the first question, namely, the statement contained in the 2nd paragraph of the petition, there has been no wilful suppression of the truth. The petitioner says that the record is missing. There is nothing to implicate him in the theft of that record, and it is admitted by the Legal Remembrancer that he cannot show any thing on the proceedings of the Court which connects the petitioner with the theft of the record. We therefore think that the petitioner in using the word "missing" acted prudently, and that he cannot be charged with suppressing the truth. With reference to the statements made in the third paragraph, there is no doubt that some of them are not strictly true, but we do not think that they are of that importance to deprive the prisoner of what we consider, under the peculiar circumstances of this case, he is entitled to, namely, to have his case transferred from the Court of the Deputy Magistrate to that of another authority. With reference to the last objection, namely, that the Deputy Magistrate ought not to be examined in this case, Section 108 of the Indian Evidence Bill, which, as already observed, has not yet come into operation, says that "no Judge or Magistrate shall be "required without his own consent to give "evidence as to what occurred in any proceed-"ing before him in Court." In this case it is said on behalf of the petitioner, and that statement is supported by an affidavit, that there was on the record of the case which has been stolen a letter written by the ammooktear of the Nawab Nazim of Bengal to Gunga Narain, one of the defendants implicated in the case. That letter refers to certain contributions for certain sums which it is alleged were paid to the Police. It is with referencet to his letter, which the petitioner says was on the record which has been stolen, and which must have come under the cognizance of the Deputy Magistrate, that he wishes to examine the Deputy Magistrate, and therefore although we fully admit that, as a general rule, it would not be right or politic to require Judges or Magistrates to give evidence except under very peculiar circumstances, we think that this is a case in which, looking to the circumstances of the case, the petitioner is entitled to have the Deputy Magistrate examined with reference to that letter and to any other points which he wishes to examine him upon with reference to the proceedings and evidence on that record.

We therefore think that our former order directing the Magistrate to take this case up and try it himself ought to stand.

The 23rd September 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Warrant—Section 68, Code of Criminal Procedure.

(Criminal Motion.)

Sideshury Chowdhrain and others, *Petitioners.*

Mr. Mun Mohun Ghose and *Baboo Doorga Mohun Dass* for the Petitioners.

Section 68 of the Code of Criminal Procedure gives a Magistrate jurisdiction on proper evidence to issue a warrant for the arrest of persons in a pending case.

Bayley, J.—In this case of forgery—Queen *versus* Ramkissore Sen and others—the application made to us is to the effect that certain warrants issued in a pending case under this charge should be set aside, and that the

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records of the case should be sent for trial to another district.

It is true that in cases where nothing but a police report has to be acted upon, that is no legal evidence on which a Magistrate should act; but in this case there is the clearest evidence of a Court Inspector who was deputed to make the enquiry as to whether a certain will alleged to have been made by Rajah Issur Chunder Roy was a genuine or a forged document. He deposes that there was no real will made by the Rajah, and that that which was set up was a forged document. He also says that the parties charged with and suspected of the offence have absconded.

I am of opinion that Section 68 of the Criminal Procedure Code does give the Magistrate jurisdiction to issue such warrants. The words of that Section are—"Except as is "otherwise provided in Chapter XI of this "Act, the Magistrate of the District, or a "Magistrate in charge of a division of a dis-"trict may, *without any complaint*, take cog-"nizance of any offence which may come to "his knowledge and may issue a summons, or "in cases where a warrant may issue, a "warrant of arrest against the person known "or suspected to have committed such offence, "in the same manner as if a complaint has "been made against such person." Irrespective of this, it has to be observed that the case is only a pending case; and we should not therefore ordinarily exercise our extraordinary powers to prevent the case from proceeding to a trial. It is then said that the parties are now ready to submit to the jurisdiction of the Magistrate, and that the warrants should be stopped, but the rule of law is that parties who seek the protection of the law must obey the process of the law, and we think we should pass no order on that matter.

With regard to the *second* point, it is to be observed that this is one of those peculiar cases where the same officer is both the Collector and the Magistrate. As a Collector, it is his bounden duty to give the result of his enquiries in a case affecting the right of inheritance of a party under or likely to be under the Court of Wards to his superior authorities, as also to state his own opinion on the subject. By his opinion as a Collector he is in no way bound as a Magistrate. As a Collector he may take cognizance of facts within his personal knowledge: as a Magistrate he is bound to act upon facts which only come to his knowledge judicially on evidence.

Irrespective of all this, it has to be observed that the case is pending before the Magistrate and the utmost that he can do is to commit the parties to the Sessions.

After hearing Mr. Ghose at some length I see no such prejudice exhibited in this case as would render it expedient for this Court to interfere and transfer the case to another Court.

This disposes of the *forgery* case.

As to the dacoity case—Queen *versus* Ram Proshad Chuckerbutty—the plea taken is that the warrants should be set aside. But the Magistrate says that he *never did nor will issue any warrant*. Mr. Ghose however refers to a paper on the record stating that there was a warrant issued authorizing the police to arrest certain parties. It appears, however, that all that the Magistrate had to do with that paper was to sanction the offer of a reward of rupees 2,000 for the arrest of the parties on the application of the Police. Upon this the Police took measures to arrest the parties, and it is argued that the reward having been offered by the Magistrate and the arrest following the reward, the latter must be taken to be the arrest of the Magistrate himself. This, however, is not so. The Magistrate is the chief executive officer of the District in his department, and as such, competent to make all executive arrangements as he thinks proper.

We are then pressed with the plea that we ought to take cognizance of the conduct of the Police in issuing the warrants illegally. The conduct, however, of the Police is a matter which ought to be brought to the notice of the superior officials in that department. They act only ministerially, not judicially. The primary responsibility of their acts rests with them, not with this Court. Under all these circumstances, we see no ground to interfere in this case.

On the *third* case, *viz.*, the application of Bishen Singh, the complaint is that after the order of the High Court suspending the issue of all warrants, he was illegally taken before the Deputy Magistrate, and the order passed was that he be sent to the jail without any evidence whatever being recorded against him. Now sending to the jail may mean that where the offence is not bailable, the prisoner may be kept in custody pending the trial; but, under the circumstances, we think it proper to ask the Deputy Magistrate for any explanation that he may give as to why the prisoner was so dealt with, and what warrant

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and what evidence there was authorizing the Police to arrest the petitioner and the Magistrate to transmit him to the hazut.

Mitter, J.—I am of the same opinion.

Whether the Magistrate has exercised a sound discretion in this case or not is a question on which I do not wish to express any opinion. The petitioners have failed to make out that the Magistrate had no jurisdiction to issue the warrants which they ask us to set aside. The evidence of the Police Inspector was sufficient to give the Magistrate jurisdiction to issue those warrants, and as the case is still pending in the Court below I do not think the petitioners are entitled to have any order from us for setting them aside.

With reference to the prayer for the removal of the case from the Magistrate's file, I wish to observe that the petitioners have not been able to make out a sufficient case. Whether the Magistrate will, under the circumstances which have transpired, like to keep the case on his own file or not is a matter entirely in his own discretion, but so far as the facts have been brought to our notice we do not think that a sufficient case has been made out by the petitioners to justify our interference. The Magistrate is not the officer who is to pass the final order in the case, and all that he can do against the prisoners is to commit them to take their trial before a higher tribunal.

In the Dacoity case it appears from the Magistrate's statements that no warrants have been issued against the petitioners, and the Magistrate expressly says that he does not intend to issue any warrants against them. If the Police have attempted or are attempting in contravention of the law to arrest the petitioners, as alleged by them in their petition, all that I can say is that they, the petitioners, should seek for relief elsewhere and in a different mode. No arrests have yet been made and any interference on our part would be therefore premature.

In the last case I am of opinion that the Deputy Magistrate ought to be called upon to explain upon what evidence, in what case, and under what authority, he had acted in keeping the petitioner Bishen Singh in hazut for 16 days.

The 25th September 1871.

Present:

The Hon'ble F. B. Kemp, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Sub-Inspector of Police — Criminal Breach of Trust—Sections 169 and 406, Penal Code—Section 19 Act I of 1871.

(Miscellaneous case).

Rajkristo Biswas, *Petitioner*.

Messrs. J. S. Rochfort and *M. L. Sandel* for the Petitioner.

Where a Sub-Inspector of Police was charged with having purchased a pony which had been impounded, it was held that the Magistrate should have proceeded under Section 19 Act I of 1871 taken with Section 169 of the Penal Code, and that the accused could not be convicted under Section 406 of the Penal Code of Criminal breach of trust.

Kemp, C. J.—THE Petitioner Rajkristo Biswas has been convicted by the Officiating Magistrate of Howrah, of the offence of criminal breach of trust, and has been sentenced under Section 406 of the Indian Penal Code to pay a fine of 25 rupees or to suffer rigorous imprisonment for a period of 10 days. It appears that the petitioner was a Sub-Inspector of Police stationed at the Thannah of Doomjurah. A pony mare was brought to the pound at that station, and after certain preliminaries were observed to bring about the sale of the pony which had been kept for some time in the pound, the petitioner purchased the pony for rupees 6. Under Section 19 of Act I of 1871 no officer of police shall directly or indirecty purchase any cattle for sale under this Act The petitioner before the Magistrate alleged that there had been a sale under the Act and that one Gopeenath Sardar had purchased the pony for 4 rupees and that an entry had been made in the Diary to that effect; subsequently the petitioner purchased the pony after it had passed from Gopeenath to another party, who again sold it to the Sub-Inspector.

The Magistrate, however, has found on the evidence that no sale took place, and as we have already observed, has convicted the petitioner under Section 406. Now, to constitute the offence of criminal breach of trust it must be shown that the petitioner was entrusted with this property, that is, with this pony, or has dominion over this pony, and that he dishonestly misappropriated or

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converted to his own use that pony. There must be an intention proved on the part of the petitioner to cause wrongful gain or wrongful loss to constitute the offence of criminal breach of trust. The Magistrate in his finding and sentence clearly states that the petitioner paid almost the approximate value of the animal. It is to be regretted in this case that the Magistrate did not proceed under Section 19 of Act I of 1871 taken with Section 169 of the Penal Code; but as the Magistrate has found on the evidence that no sale took place and has convicted the petitioner under Section 406, we must hold, as a point of law, that the petitioner has not committed any such offence as to bring him under the provisions of Section 405, namely, that he has not dishonestly misappropriated or converted this pony to his use. We therefore think that the conviction must be set aside and the fine refunded.

Ainslie, J.—I concur.

The 4th October 1871.

Present:

The Hon'ble F. B. Kemp, *Officiating Chief Justice* and the Hon'ble W. Ainslie, *Judge.*

Procedure—Written defence—Chapter XV Code of Criminal Procedure—Examination of Accused.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Magistrate of Bogra.

Dila Mundul and others,

versus

Kally Shaha and others.

When a written defence is tendered in a case tried under Chapter XV of the Code of Criminal Procedure, the Magistrate is not bound to take down the defence of the accused by personally examining him.

Ainslie, J.—Ful Mohmud sold 6 buffaloes to Dila Mundul and apparently gave them into his possession; he also sold the same animals to Kally Shaha. The latter brought a suit against Ful Mohmud to compel him to deliver the buffaloes to him. In this suit he obtained an injunction described as an "ishtehar" addressed to the defendant to restrain him from making away with the property the subject of the suit.* By virtue of this injunction the Civil Court peon seized the cattle, which he had no authority to do, nor could he in any way have supposed himself to have authority. We must assume that he knew this. A plea of good faith founded on *crassa ignorantia* is inadmissible. Thus whether the cattle were still in the possession of Ful Mohmud or not, here was a deliberate wrong under color of legal process, aggravated, not justified, by the form of proceedings. In so seizing the cattle he and those who aided him and who cannot, under the circumstances of the case, be supposed to be ignorant that they were acting illegally, clearly laid themselves open to prosecution. The pretence that the keepers of the cattle fled and abandoned them, is flimsy in the extreme. The Deputy Magistrate is doubtless right in treating this as no voluntary abandonment, and it gave no right to the peon or to those with whom he was acting to seize them.

* This was an injunction under Section 92 Act VIII of 1859, not an attachment order under Section 83.

As to the procedure of the Deputy Magistrate, we think that, when a written defence is tendered in a case tried under Chapter XV of the Criminal Procedure Code, it is not incumbent on the Magistrate to take down the defence of the accused by personally examining them.

The Court declines to interfere with the conviction and sentences recorded by the Deputy Magistrate. The records are returned herewith.

The 6th October 1871.

Present:

The Hon'ble F. B. Kemp, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*

Procedure — Theft — Boat — House-Trespass.

The Queen *versus* Mehar Dowalia and others, *Appellants.*

Committed by the Magistrate and tried by the Sessions Judge of Furreedpore on a charge of dacoity, &c.

A boat may be the subject of theft. Although under Section 442 of the Penal Code it is for certain purposes classed with houses, it does not cease to be moveable property under Section 378.

A charge under Section 451 must charge the accused with committing house-trespass with intent to commit some *specific* offence punishable with imprisonment,

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Ainslie, J.—The prisoners were charged with committing dacoity in a boat under Section 395. The Sessions Judge added a charge under Section 451 of house trespass by night. It is not clear why the words "by night" are used. Lurking house trespass and house-breaking are punishable under different Sections according as the trespass may be by day or night, but the time is not taken into account in the Sections which speak of house trespass other than lurking house trespass or house-breaking (Sections 442, 448, 449, 450, 451, 452). The Judge has acquitted the accused in respect of the charge of dacoity and convicted them of house trespass by night under Section 451 and sentenced them to rigorous imprisonment for 18 months.

Section 451 runs thus:—"Whoever commits house trespass in order to the committing of any offence punishable with imprisonment shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine: and if the offence intended to be committed is theft, the term of imprisonment may be extended to 7 years."

The Judge has neither charged the accused with, nor convicted them of, trespass with intent to commit any offence punishable with imprisonment, and except for the introduction of the words "by night" which are without any effect the charge and conviction, if sustained at all, must be taken as being under Section 448.

It is difficult to see why any recourse was had to the trespass Sections at all. The Judge's finding, if it is a finding of any offence, is in substance that a dacoity took place. He says "the knowledge of these "facts makes the seizure of Kooran's empty "boat (*and its destruction, though its destruc-* "*tion has not yet been proved*) intelligible—it "also explains the attack with sticks and "the flight of Kooran and his people and their "subsequent charge of a dacoity * * * * "From the evidence in this Court and the at-"tending circumstances I am of opinion that "there is no proof of any dacoity, that also "there is no proof what amount of money "was carried off from the boat, nor even do "I credit that the amount stated was in the "boat. I believe this was an attack upon "Kooran's boat to satisfy private enmity, and "therefore I think the defendants should not "have been committed under Section 395, "but under Section 451 and the charge will "be rectified accordingly."

It does not seem to have occurred to the Judge that a boat might itself be the subject of theft and that because under Section 442 it is for certain purposes classed with houses it does not cease to be moveable property under Section 378.

When the Judge found that a body of men, stated to have been 20 or 25 in number, armed with sticks, attacked a boat, put its occupants to flight, carried it away and concealed or destroyed it so that nothing has been heard of it since, he found every element of dacoity. There was the dishonestly (to cause wrongful loss) taking of moveable property without the consent of the person in possession which was theft. There was the voluntary causing of fear of instant hurt making that theft robbery, and the number of persons engaged making that robbery dacoity. It was not material, as far as the nature of the offence committed is in question, that there was doubt as to the bags of rupees and copper coins or any other property being in the boat; the fact that the loss was exaggerated does not alter the character of the offence.

It is manifest that the conviction, if any, should have been on the charge framed by the committing Magistrate; but there has been a verdict of acquittal recorded on this charge which is final.

The charge under Section 451, if properly drawn, would have charged the accused with committing house trespass with intent to commit some specific offence punishable with imprisonment; but as this was omitted, nothing remains in the charge or conviction but the house trespass, and the maximum punishment for that under Section 448 is imprisonment for one year. But even this reduced sentence is not warranted by the finding of the Sessions Judge. He has taken great pains to show that the charge of dacoity was fabricated with a view to injure one Mothoora Nath Gangooly Naib to Gooroo Das Roy, and he throws out doubts whether the confession of the accused was not improperly obtained by the Police. "In this Court they deny the "charge and assert that their confession was "not a confession but a statement obtained "from them on the plea that they were giving "evidence. There may possibly be some truth "in this and their statement does not seem "to have served its purpose in bringing the "offence home to the Naib, so that their con-"fession can now only affect themselves." We do not understand on what principle the Judge supposes that the confession of one accused person was to affect another accused

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person; but passing that, we observe that the Judge has altogether failed to consider the effect of the deception which he admits may possibly have been used to get the accused to make certain statements intended to criminate a third party; he seems rather to incline to a belief that these statements were not genuine, for towards the conclusion of his judgment he says "it is not so easy to explain "the confession of the three defendants *unless* "*they were induced to confess in order to obtain* "*evidence against the Naib.* They however "must abide by that confession and have no "ground to complain; for, if true, they ought "to be punished themselves, and if false, "they are guilty of trying to bring a false "charge home to an innocent man." Now as the Judge has distinctly found that there was a deliberate attempt falsely to implicate the Naib in this case, one must take his finding to be in substance as follows. The evidence against the accused is of scarcely any value; their confessions were improperly extorted and are not to be trusted; but if they have not been guilty of either one of the offences charged they have been guilty of an offence not charged and therefore they have no right to complain if they get a punishment suited to one or other state of facts. It is not usual to punish a man for an offence with which he is not charged and the provisions of Section 381 Procedure Code and Section 72 Penal Code do not warrant an alternative finding when there are no charges to support it.

The Sessions Judge taking the view of the evidence which he has adopted was bound to acquit the accused altogether. False evidence will no more warrant a sentence of 18 months' imprisonment than one of transportation for life.

The appellants must be immediately released.

The 9th October 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Opium—Penalty—Revising power of High Court—Informers.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Patna.

The Queen *versus* Ramdyal Singh and another.

The distribution of a penalty adjudged by a Magistrate under Section 26 Act XIII of 1857 is no part of his judgment, and therefore not a matter over which the High Court can exercise control under Section 404 of the Code of Criminal Procedure.

Quære.—Whether a person who does not come forward in person as an informer and take the responsibilities together with the profits of his information, is entitled to any part of the penalties recovered.

Ainslie, J.—We think that we cannot interfere under Section 404 of the Criminal Procedure Code. Under Section 26 Act XIII 1857, all fines, penalties and confiscations, prescribed by the Act, shall be adjudged by the Magistrate. Under Section 30 one-half of all fines and penalties levied from persons convicted of offences under Sections 19, 20 and 21 of the Act, together with a reward of 1 rupee and 8 annas for each seer of opium confiscated and declared by the Civil Surgeon to be fit for use, shall, upon *adjudication of the case*, be awarded to the officer or officers who apprehended the offender, and the other half of such fines and forfeitures, together with a reward of 1 rupee and 8 annas for each seer of opium confiscated as aforesaid, shall be given to the informer. The Section then goes on to provide that when the fine or penalty is not realized, the Board of Revenue may grant such reward not exceeding rupees 200 as may seem fit.

We think that the Magistrate is not bound to declare in his judgment how the fine shall be disposed of. It is his duty to adjudge the fine, and it is a necessary consequence of such adjudication that the penalties realised shall go to the parties indicated by the Act. If no fine comes into the Magistrate's hands under the adjudication, the matter then passes to the Board of Revenue who can grant a reward. This appears to indicate clearly that the distribution of the penalty is no part of the judgment, and, therefore, not a matter over which this Court can exercise control.

There is another point which the Sessions Judge seems to treat as immaterial, but on which we entertain considerable doubt, namely, whether a person who does not come forward in person as an informer and take the responsibilities together with the possible profits of his information, is entitled to any part of the penalties recovered. It is however not necessary to consider this matter at length. We cannot interfere. Let the papers be returned to the Sessions Judge.

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The 9th October 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Jury—Objections to Jurors.

Committed by the Assistant Commissioner and tried by the Judicial Commissioner of Assam on a charge of aiding and abetting the dishonest retention of stolen property with guilty knowledge, &c.

The Queen *versus* Krisno Churn and others, *Appellants.*

The allowing of an objection to a Juror coming within the 3rd Clause of Section 344 of the Code of Criminal Procedure, is in the discretion of the Court; and although the Judge is not bound to admit the objection, yet he should not treat it as frivolous.

Ainslie, J.—SEVEN persons have been convicted on a trial held before the Judicial Commissioner of Assam and a Jury under several Sections of the Indian Penal Code of doing certain acts in pursuance of a conspiracy to make away with the property of one Gopee Ram, a trader at Dobaka in Zillah Nowgong, who died in the month of Aughun last. Roghonath and Lochun Ram have been convicted of forging a Will purporting to have been executed by Gopee Ram in favor of Gonesh Ram; Gonesh Ram of having possession of the forged Will with intent to use the same dishonestly; Komul Narain of forging certain accounts to make it appear that the property of Gopee Ram had come into possession of the conspirators by purchase; and the others of having possession of, and abetting the taking possession of, the property of the deceased, the same having been obtained under circumstances which constituted an offence under Section 404 of the Penal Code.

Three of these persons, Roghonath, Lochun Ram and Komul Narain, made statements before the Magistrate criminating themselves. The principal evidence is that of the approvers, Roghonath and Radhanath; in addition to this, the witness Mohai distinctly proves the destruction by Gopee Ram of the original Will drawn up by him, and there is some other evidence in corroboration of the approvers' statements.

The Jury were satisfied that the statements of the approvers were substantially true, and unanimously came to the conclusion that all the appellants are guilty of the offences severally charged against them. The Judge's charge is not open to objection on the ground of misdirection. One of the points strongly insisted upon by all the appellants is an objection to one of the Jurors,—this was however only taken by one prisoner, Gunesh Ram, before the Judicial Commissioner, and was overruled.

The objection was one coming within the 3rd Clause of Section 344, and consequently the allowing of it depended upon the judgment of the Court. It is, we think, to be regretted that the objection was not allowed, as it would have been more satisfactory if the Jury had been altogether unchallenged; and although we are not prepared to say that the Judicial Commissioner was bound by the terms of the law to admit it, yet we cannot concur with him in describing it as frivolous.

These appeals are dismissed.

The 10th October 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Appeals—Nuisances—Revising power of High Court.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of West Burdwan.

Shitaram *versus* Ramanund.

There is no right of appeal from the decision of a Jury appointed to try whether the order of a Magistrate for the removal of a nuisance under Section 308 of the Code of Criminal Procedure was reasonable and proper. Such decision of the Jury is not a judicial proceeding with which the High Court can interefere under Section 404.

Ainslie, J.—THE Magistrate called upon one Ramanund, on the complaint of Shitaram under Section 308 of the Code of Criminal Procedure, to remove certain obstructions to a particular thoroughfare. Ramanund claimed to have the propriety of the order tried by a Jury. The Jury found that the order of the Magistrate was to a certain extent reasonable and proper; and the Magistrate proceeded to enforce it *pro tanto.*

Ramanund presented a petition to the Sessions Judge, praying him to quash the proceedings, and the Judge holds that the Jury found

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that the road was not a public thoroughfare, and has reported the matter to this Court under Section 434 of the Criminal Procedure Code. What the Jury found was, that the pathway was used by the women of the village as a means of access to a certain tank, and that Ramanund had no right to close it altogether; but that the complaint of obstruction was exaggerated, and that with reference to the width of the passage at other parts it was not necessary to keep open a way of greater width than 3 feet. The order of the Magistrate, so far as it related to this portion of the road, was held to be reasonable and proper. We are of opinion that the petitioner has no right of appeal from the decision of the Jury, and that it is not a judicial proceeding with which this Court can interfere under Section 404 of the Criminal Procedure Code.

The 11th October 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Contempt—Chapter X, Penal Code—Jurisdiction.

Reference to the High Court by the Sessions Judge of Gya in the case of Ashruff Hossein and another, prisoners.

The form of an accusation by a District Superintendent of Police under Section 193 of the Penal Code does not preclude a Magistrate from framing the charge under Section 177; the sanction of the District Superintendent required under Section 168 Code of Criminal Procedure to give the Magistrate jurisdiction, need not be express but may be implied.

Ainslie, J.—The Sessions Judge holds that a prosecution instituted by a District Superintendent of Police under Section 193 of the Indian Penal Code and Section 29 Act V of 1861 does not imply sanction to a charge, arising out of the facts set forth by the prosecution, being drawn up by the Magistrate by virtue of the powers vested in him by Section 250 of the Code of Criminal Procedure, under Section 177 of Chapter X of the Penal Code, and that express sanction under Section 168 of the Procedure Code is necessary to give the Magistrate jurisdiction.

It has been ruled that a Magistrate can, by his mode of procedure, sanction a prosecution of the offences specified in Sections 169-170, Procedure Code, by implication, and that this is a valid sanction in the absence of express words. This appears to us a very similar case—the prosecutor is the Assistant Superintendent of Police acting immediately under the orders of the District Superintendent; the offence is said to have been committed by certain acts which were from the first made the subject of investigation. The District Superintendent considered that they disclosed the offence of fabricating false evidence—the Magistrate thought the offence was more properly to be defined as furnishing false information on a subject in respect of which the accused was legally bound to furnish information. Whichever view be taken of the nature of the offence, there cannot be the slightest doubt that there was a prosecution under the direct sanction of the District Superintendent of Police, and that his object was to get the accused punished for the offence involved in certain acts which he undertook to prove. It is not as if in the course of investigation into an offence of a totally different character the evidence had casually disclosed that there was also an offence punishable under Chapter X of the Penal Code, the prosecution of which had not been contemplated.

Here the offence prosecuted was that of giving false information, and the form of the accusation under Section 193 does not, in our opinion, preclude the Magistrate from applying the provisions of Section 177; it cannot be doubted that he had the implied sanction of the District Superintendent to frame the charge in any way he thought best, so long as it should in substance set forth the offence he was desirous of prosecuting the accused for. The case of Abdool Luteef, IX W. R., Criminal Rulings, page 31, cited by the Judge, is clearly distinguishable from this case, as the prosecutor was there a subordinate Police officer acting on his own account as a private individual, whereas here he is the District Superintendent himself acting through his subordinate the Assistant Superintendent of Police.

So far as the judgment of the Sessions Judge is based on the technical defect in the Magistrate's procedure, we think it is erroneous; but, as pointed out by the Judge, there was also a finding on the evidence leading to the same result, namely, the acquittal of the accused, with which this Court cannot interfere.

The Judge has recorded as follows; "The flaw is, I consider, fatal to the conviction and vitiates the whole proceedings. Apart from this, however, I find so much in the evidence that is bad, that on that alone I should have been justified, I consider, in acquitting the

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prisoners." He then went into the details of the evidence and pointed out the defects which, in his opinion, rendered it unworthy of credit.

In respect of the charge of falsely reporting the movements of Ashruff Hossein in the Kouch Dacoity case, the Judge states that there is corroborative evidence against Ishur Dyal in his own admission to the Magistrate which he takes to be free from suspicion: but he reverses the conviction and sets aside the sentence on the ground of want of sanction. This part of the case must be re-considered and a judgment given on the merits.

The 23rd November 1871.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Adjournment—Section 269 Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Sylhet.

Mahomed Alum *versus* Sheikh Akil and others.

The Deputy Magistrate's order dismissing a case for default (after repeated unnecessary adjournments and after the accused was put on his defence) upon a day to which no legal adjournment was made, was set aside as illegal.

Reference.—THE complainant brought a charge of criminal trespass and causing mischief against the defendant.

Syud Mahomed Israil, Deputy Magistrate, dismissed the case on default of the complainant.

The 19th August was the date fixed for trial and the parties appeared on that day, but the Deputy Magistrate, contrary to High Court's Circular No. 12 dated 27th November 1865 to which I have repeatedly called attention, discharged the witnesses on their own recognizance without taking their depositions because a female defendant was absent and postponed the case until the 21st. On that day he examined the witnesses, fixed no date for hearing the case again, but merely ordered to bring it up "the next time." On the 29th the case was accordingly brought up for hearing and accused was put on his defence. The case was then adjourned till next day the 30th; but instead of hearing the case on that day, he heard it on the following day the 31st, without an adjournment as prescribed in Section 269 "to a day to be then appointed and stated in the presence and hearing of the party or parties."

I think that the Deputy Magistrate's order is not only illegal but harsh—illegal because the adjournment to the 31st was no legal adjournment under Section 269—and harsh because the dismissal is not compulsory even when an adjournment has been legally made. All that the law says is "the Magistrate may dismiss the complaint." In this case the Deputy Magistrate was bound to be lenient considering the number of times the case was unnecessarily put off. At any rate the Deputy Magistrate might have satisfied himself as to complainant's absence a little more carefully than by merely calling out for him in the usual way. The hardship in this case is all the stronger because the accused was put on his defence, and it might therefore be presumed that a *primâ facie* case had at least been made out by complainant. I would therefore recommend that the Deputy Magistrate's order dismissing the case on the ground of complainant's absence be reversed.

The Deputy Magistrate's explanation is forwarded with the records of the case.

Judgment of the High Court.

Jackson, J.—We think that the order of the Deputy Magistrate is illegal and that it must therefore be set aside, and, if the complainant desires, the case will be proceeded with. The constant unnecessary adjournments by the Deputy Magistrate of this description of case is most reprehensible; and if it is the case, as the Magistrate states, that he is in the habit of making such adjournments without proper cause, the Magistrate should bring the matter to the notice of the Government.

The 23rd November 1871.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Procedure—Examination of complainant.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Dinagepore.

Nilmoney Bhuttacharjee on the part of Kaminnee Soondury Debey.

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Under Section 66 Code of Criminal Procedure a Magistrate is bound to examine the complainant and record his deposition and then to pass orders for summons or otherwise as may be necessary.

Glover, J.—UNDER Section 66 Code of Criminal Procedure, the Magistrate was bound to examine the complainant and record his deposition and then to pass orders for summons or otherwise as might have been requisite. His order directing the petition to be filed in the office—in other words to be shelved—was illegal and must be set aside.

He is directed (should the complainant wish to proceed with the charge) to take his examination and proceed with the case according to law.

The 23rd November 1871.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Opium—Revocation of licence.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Judicial Commissioner of Assam in the case of Ramdass.

According to Section 38 Act XXI of 1856, no conviction can be had under Section 50 against a person whose licence has not been recalled.

Glover, J.—THE Assistant Commissioner appears to have overlooked the provisions of Section 38 Act XXI. 1856. The licence not having been recalled (and before convicting the accused under Section 50 it was necessary to prove that it had been recalled) Ramdass was still by law a duly licensed vendor of opium and therefore committed no offence either in selling the drug, or in having more than 5 tolahs of it in his possession. The order of the Assistant Commissioner is set aside, and the fines (if levied) ordered to be returned to Ramdass.

The 23rd November 1871.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Procedure—Chapter XIV Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.

Jungi Khan *versus* Hur Chunder Rai.

In a case apparently coming under Chapter XIV of the Code of Criminal Procedure, where the complainant has deposed on solemn affirmation, the mere denial of the accused proves nothing. The complainant's witnesses should be examined and the investigation proceeded with.

Glover, J.—Under the circumstances detailed by the Sessions Judge, we quash the order of the Deputy Magistrate and direct him to re-open the case (supposing the complainant still desires to prosecute) and to summon the complainant's witnesses in the usual way.

It may turn out eventually that the grave portion of the charge cannot be sustained and that the case does in reality come under Chapter XV of the Code of Criminal Procedure; but, *primâ facie*, the matter comes under Chapter XIV of the Code (the complainant having deposed on solemn affirmation) and the mere denial of the accused proves nothing. The witnesses must be sent for and the investigation proceeded with.

The 23rd November 1871.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

False Evidence—Jurisdiction.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Rajshahye.

Gopal Mozumdar *versus* Hurro Soondery Boistomee.

A Sessions Judge has no authority under the law to interfere with the order of a Magistrate allowing a prosecution for false evidence.

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Reference.—THE Magistrate considers that I had no power to interfere or to set aside his order permitting the prosecution of the mother of Shurnomoyee. I consider that when the Magistrate is holding only the preliminary investigation in cases triable by the Court of Sessions alone, and when an application is made to the Judge under Section 435 and the record is called before the Court, the Sessions Judge has a right to express an opinion on the case and on each point connected with the case, as stated in the decision of the Magistrate. Section 434 Criminal Procedure Code does not permit the Court of Session to alter or reverse an order, but requires that the record should be forwarded to the High Court for reversal, &c., of the decision come to in the Magistrate's Court. But Section 435 gives the Sessions Court power to reverse the order of a Magistrate discharging a prisoner, &c., and I do not consider that I exceeded my powers when I gave expression to my opinion as to the expediency or legality of giving permission to the accused to prosecute the mother of Shurnomoyee for giving false evidence.

Judgment of the High Court.

Jackson, J.—We think that the Sessions Judge had no authority under the law to interfere with the order of the Magistrate, allowing the prosecution of Hurro Soondery Boistomee by Gopal Chunder Mozumdar, and that such order of the Magistrate was in no way illegal. The Sessions Judge's order of the 26th July is set aside, and if Gopal Chunder Mozumdar desires, he can proceed with his complaint, and the Deputy Magistrate will hear and pass orders upon it.

The Deputy Magistrate's decision of the 14th August dismissing Gopal Chunder Mozumdar's complaint is set aside.

The 25th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Cumulative Sentence—Sections 143 and 353 Penal Code—Unlawful Assembly—Criminal force.

Miscellaneous Criminal Case No. 138 of 1871.

Gobind Chunder Roy and others, *Petitioners.*

Baboo Mohinee Mohun Roy for the Petitioners.

A cumulative sentence under Section 143 of the Penal Code (being a member of an unlawful assembly) and under Section 353 (using criminal force against a public servant) was upheld by the High Court in this case.

Bayley, J.—WE think this application must be rejected. The prisoner was convicted under Section 143 of the Indian Penal Code as being a member of an unlawful assembly and sentenced to four months' rigorous imprisonment. He was also found guilty under Section 353 of using Criminal force against a public servant.

It is urged that such a cumulative sentence under the two Sections is illegal, and W. R., Vol. XII, page 2, Vol. X, page 63, and Vol. VII, page 13, have been cited in support of the contention. No doubt the principles there laid down support in a general view the pleader's argument; but the precedents cited cannot apply unless the facts and the circumstances are the same. The facts in those cases shew the offences there to be so nearly cognate and similar to each other that one could hardly be separated from the other; whereas in the present case the offence under Section 143 is quite different in nature from that under Section 353.

The application is rejected.

Paul, J.—In this case the prisoner had been sentenced to eight months' rigorous imprisonment. He might have been sentenced under the second charge of which he was convicted to one year's rigorous imprisonment. Under these circumstances, I would decline to interfere.

The 25th November 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Municipal—Act III. 1864 (B. C.) Section 67—Filthy land.

Miscellaneous Criminal Case No. 142 of 1871.

Dwarkanath Hazrah, *Petitioner.*

Baboo Anund Chunder Ghosal for the Petitioner.

Where the owner of certain land lived in another district and was not proved to have suffered the land to be in a filthy state, and the Municipal Commissioner fined his mooktear under Section 67 Act III of 1864, B. C., which empowered him to fine *either the owner or occupier*,—HELD that the discretion which that Section gave had not been properly exercised—proceedings quashed, and refund of fine directed.

Kemp, J.—THIS is a charge brought in the first instance against Baboo Joy Kishen Mookerjee of Ootturparah, who was supposed

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to be the owner of the soil. The charge, looking to the form 5 of the Nuthee, was for depositing sal leaves for more than 24 hours. Hurrish Chunder Mookerjee, a Sub-Overseer of the Burdwan Municipality, appeared as prosecutor. The Mookhtar Dwarkanath Hazrah in defence stated that the land belonged to Baboo Pearee Mohun Mookerjee, the son of the aforesaid Joy Kishen Mookerjee, upon which notice was served upon Pearee Mohun Mookerjee. In answer to that notice Baboo Pearee Mohun Mookerjee admitted that the land belonged to him, but urged that the ryots in occupation were liable and not the landlord. The defence of Dwarkanath Hazrah was that he was the Mookhtar, that the land was occupied by tenants, that his employer lived in another district and therefore, to use the words of the Mookhtar, could scarcely be liable. He admitted that he was the employee of Baboo Pearee Mohun Mookerjee. Upon this Mr. J. Cockburn fined the Mookhtar rupees 20. Under Section 67 of Act III of 1864, B. C., the Municipal Commissioner was empowered to fine either the owner or occupier of the land *who suffered the same to be in a filthy state.* Now looking to the fact that the owner of the land Baboo Pearee Mohun Mookerjee admittedly lives in another district, and as there is no evidence that he suffered the land to be in a filthy state, we think that the discretion which the above Section of the Act gives the Court has not been properly exercised in this case. We therefore quash the proceedings and direct that the fine, if paid, be refunded.

The Municipal Commissioners are at liberty to proceed against the occupiers of the land if they think fit so to do.

The 29th November 1871.

Present:

The Hon'ble F. A. Glover, *Judge.*

Evidence—Sworn Interpreters—Section 198 Code of Criminal Procedure.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Moorshedabad on a charge of giving false evidence.

The Queen *versus* Mudun Mundle, *Appellant.*

There is no necessity under Section 198 Code of Criminal Procedure for making use of a regularly sworn interpreter to interpret his evidence to a party making a statement.

The point of law taken in this appeal is that the exhibit D (the deposition of the accused taken at the Sessions in English) ought not to have been received in evidence against him, inasmuch as it had not been interpreted to him by a "sworn" interpreter.

Section 198 Code of Criminal Procedure provides that, when the statement of a witness is recorded in a language which he does not understand, he, the witness, "may require "his evidence as taken down to be interpret-"ed to him in a language which he under-"stands." There is no provision for making use of a regularly sworn interpreter—except in cases where his services are required by the Court (Section 431 Criminal Procedure Code). It is the presiding officer's duty to see that the evidence is clearly and properly interpreted to the party making a statement, and the certificate or memorandum specified in Section 199 is sufficient proof, until the contrary be shewn, that the deponent understood all that was written down as deposed to by him. A sworn interpreter is only required when the Court and Jury are ignorant of the language in which a witness is deposing.

The Sessions Judge was not quite right in telling the jury that the absence of proof of sworn interpretership might affect the degree of credibility to be attached to the exhibit D as representing what the accused said when a witness at the Sessions—for the want of sworn interpretership would not, it seems to me, have that effect—the general question of credibility, namely, whether the prisoner did or did not make the statement contained in exhibit D, would, of course, remain; but that the Jury considered.

The accused has certainly not been prejudiced, on the contrary he has had somewhat more than his rights.

The appeal is rejected.

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The 30th November 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Revision by High Court—Procedure.

Reference to the High Court by the Officiating Magistrate of Mymensing, for revision, under Section 404 of the Code of Criminal Procedure, of proceedings in the case of

Sheik Hazari *versus* Chundi Churn Chuckerbutty.

Application for revision by the High Court of an order passed in appeal by a Sessions Judge must be by motion.

Paul, J.—In this case an appeal was heard by the Judge from the decision of the Officiating Magistrate, and on that appeal the Judge reversed the decision of the Magistrate and released the prisoner who had been convicted. According to Circular No. 7 of the High Court, dated 12th August 1869, application for revision under the circumstances of this case should be made by motion by the parties interested or their pleaders. We therefore think it would have been more formal and regular to have left it either to the party aggrieved or the Government pleader, if he thought fit, in the interests of justice, to have moved this case for revision.

Moreover we have read the decision of the Judge, and we think he was quite right in his view of the law as applicable to the circumstances of this case.

The 2nd December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mischief.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Midnapore.

Kashi Nath Ghose and others *versus* Dinobundhoo Mytee.

Without evidence that the accused intended or knew that he was likely to cause wrongful loss or damage to the complainant, the offence of mischief under Section 425 of the Penal Code was held not made out.

Kemp, J.—We think that the Judge has taken a right view of this case.

There is no evidence that the accused intended to cause, or knew that they were likely to cause, wrongful loss or damage to the complainant; and in the absence of such intention or knowledge the offence of mischief, as defined in Section 425 of the Indian Penal Code, with the explanation annexed thereto, is not made out.

The order of the Joint Magistrate is set aside, and the fine, if paid, must be refunded.

The 2nd December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Maintenance of wives and children—Section 316, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Midnapore.

Pachoo Dass *versus* Sreemotee Soodhamonee.

The Deputy Magistrate's order in this case was quashed as illegal, he having held that the wife was not entitled to maintenance under Section 316, Code of Criminal Procedure, and yet, without evidence of the husband's unwillingness but the contrary to support his infant children, directed him to pay her a monthly sum as maintenance for the children.

Reference.—The prosecutrix sued her husband for maintenance under Section 316 Act XXV of 1861 on the ground of infidelity and cruelty.

The Deputy Magistrate considered that the wife having failed to prove her case was not entitled to maintenance, but directed the husband and father to pay Rs. 3 per month to the wife as maintenance for the two children.

The Deputy Magistrate's order in effect deprives the father of the custody of his children, one of them aged 3 years, whom he expressed himself willing to support along with their mother if she would live with him.

The Deputy Magistrate, having held that the wife was not entitled to maintenance under Section 316 Criminal Procedure Code, ought to have stopped there and not gone on to order an allowance for the children,

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thereby indirectly enabling the wife to effectuate her refusal to live with her husband without sufficient reason. I think the order was improper, and that there is no sufficient proof to sustain it.

The Deputy Magistrate's explanation accompanies the reference.

Judgment of the High Court.

Kemp, J.—We think that the proceedings of the Deputy Magistrate are illegal. He finds that the wife is not entitled to receive maintenance, as she has not been able to prove that her husband ill-treated her, or was living in adultery with another woman. There is no evidence that the husband is unwilling to support his infant children; on the contrary he states that he is willing to do so provided they reside under his roof and not in his father-in-law's house. The order of the Deputy Magistrate is quashed.

The 2nd December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Commitment—Trial — Wrongful restraint—Slavery.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Backergunge.

The Queen *versus* Firman Ali.

The Sessions Judge was held bound to try the accused upon his commitment by the Deputy Magistrate on a charge, under Section 370 Penal Code, of having detained a woman against her will as a slave.

Reference.—THE Deputy Magistrate of Perozepore has committed one Firman Ali to take his trial at the Court of Session on a charge under Section 370 Indian Penal Code, of having detained one Abidulnissa against her will as a slave.

The evidence goes to show that Abidulnissa was induced under certain pretences to leave Calcutta and go to the prisoner's house in Gyanpara and was there detained against her will and employed in a menial capacity.

It seems to me that the ordinary "Bandhi" or so-called slave girl in a Mussulman family is not a slave in the legal acceptation of the term. There is no definition of the word *slave* or *slavery* in the Penal Code. The definition of slavery according to Blackstone is that "Civil relation in which one man possesses absolute power over the life, liberty, and fortune of another." Such a state of things does not and cannot subsist in England or British territory. The Indian Penal Code provides specific enactments to meet the invasion of life, liberty, and fortune of one person by another, and therefore if, taking the present case as an illustration, it be proved that Abidulnissa has been detained against her will and made the victim of compulsory labor, Firman Ali, the person accused of so detaining her, is liable to punishment for the offence of wrongful restraint or wrongful confinement. As I understand the provisions of the Indian Penal Code, Sections 370, 371, which relate to slavery, they are intended to meet the case of persons dealing with slaves *in connection with a foreign country* where slavery obtains. In India itself, although the treatment which some unfortunates receive at the hands of their master may well entitle them to be regarded as slaves, there is no such thing as slavery proper, the said masters being penally liable for any acts which they may commit in violation of the liberty of the subject. The point raised is one of great importance, for there can be no question that the position of the woman Abidulnissa is by no means unique, and that if Firman Ali is liable under Section 370 Indian Penal Code for his treatment of her as a slave, every Mussulman in the country who possesses a "Bandhi" is liable to a criminal prosecution. Under these circumstances, I have the honor to request that, if the High Court agree in my view of the law, they will quash the order of commitment of the Deputy Magistrate.

Judgment of the High Court.

Glover, J.—There is nothing illegal in the commitment made by the Deputy Magistrate. The charge preferred was one of an offence punishable by the Penal Code (Section 370) and the Sessions Judge was bound to try it. It will be for him to decide, when the case comes before him, whether the evidence is sufficient to prove the offence of keeping Abidulnissa against her will as a slave. The Sessions Judge has also by law the power of amending the charge, should he think proper to do so.

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The 2nd December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Breach of the peace — Section 318 Code of Criminal Procedure.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of* 24-*Pergunnahs.*

Tarafdi Mundul *versus* Chunder Bhoosun Banerjee and others.

Before initiating proceedings under Section 318 Code of Criminal Procedure, a Magistrate must satisfy himself on legal evidence that there exists a likelihood of a breach of the peace and also record a proceeding stating the grounds of his being so satisfied.

Glover, J.—UNDER the circumstances stated by the Sessions Judge, we think that the Cantonment Magistrate's order must be quashed.

Before initiating proceedings under Section 318 Criminal Procedure Code, a Magistrate must first satisfy himself on legal evidence that there exists a likelihood of a breach of the peace, and must also record a proceeding stating the grounds of his being so satisfied.

The 8th December 1871.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Taking illegal gratification—Appeal —Revising power of High Court.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Judicial Commissioner of Assam, in the case of*

Mutty Lall Chuttopadhya and another, *Petitioners.*

Baboo Mohinee Mohun Roy for the Petitioners.

On a conviction of taking illegal gratification, a simple order to refund the money taken is quite inadequate to the gravity of the offence. Although no appeal lay in such a case, yet the High Court upon a reference, having power to interfere, quashed the conviction.

Bayley, J.—I HAVE carefully gone through all these papers. The Magistrate has convicted the two prisoners of taking illegal gratification, and sentenced them, the 1*st* to a fine of 50 rupees and the 2*nd* to a fine of 30 rupees.

In the first place I would observe on such a conviction as this, that the simple order to refund the money taken is quite inadequate to the gravity of the offence. In such a case, however, the Judicial Commissioner has no jurisdiction by way of appeal and the order is final excepting so far as the Judicial Commissioner has the power to send the papers to the High Court in order that this Court may pass such order as it thinks proper.

Now I have been carefully through all the papers, and I quite concur with the Judicial Commissioner in considering the evidence for the prosecution to be untrustworthy. There is the grossest discrepancy as to the locality where the money was borrowed, as to whether the loan was to carry interest, and as to the form in which the money was conveyed to the prisoners. The Mahajan from whom the money was said to have been borrowed utterly denies the transaction on his oath, and there is no reason why he should favor the prisoners. The evidence of the manager of the Sidlee estate, Mr. Scanlan, in no way supports the case of the prosecution, but on the contrary shews that he was not influenced by the Sheristadar in the matter for which the money is said to have been given. I think the case is one where the High Court should interfere and quash the conviction by the Magistrate; but as the local officers have come to opposite conclusions on the evidence, I think the decision of the Deputy Commissioner of Gowalparah, being then contrary to law as being against the evidence, is set aside.

Kemp, J.—I have very carefully considered this case. I entirely distrust the evidence adduced by the prosecutor. The discrepancies and inconsistencies in that evidence are fully set forth in the referring resolution of the Judicial Commissioner and have been commented upon by my learned colleague, Mr. Justice Bayley. I entirely concur in the opinion expressed by Mr. Justice Bayley, and would quash the conviction.

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The 9th December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Murder—Mitigation of sentence—Power of High Court.

The Queen *versus* Jamal and others, Appellants.

Committed by the Magistrate and tried by the Sessions Judge of Dacca on a charge of Murder.

Baboos Kalee Mohun Dass and Durga Mohun Dass for appellants.

The High Court has no power, even where there is ground for doing so, to mitigate a sentence of transportation for life passed on persons found guilty of murder.

Jackson, J.—THERE is no doubt that all these prisoners have been guilty of murder, and they must be sentenced either to death or to transportation for life. We have no power under the law, to mitigate the sentence of transportation for life which has been passed, even if there was any ground for doing so. We reject the appeal.

The 13th December 1871.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—High Court—Dismissal—Trespass—Right of Private Defence—Assault—Delay—Bruises.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensing.

1. Mahomed Jan *versus* Khadi Sheik.
2. Hurnath De Khashkhil *versus* Joygopal De Sarkar.
3. Huris Chundra Das *versus* Bolai Audhicaree & others.
4. Sheik Ahmuddy *versus* Anund Mohun Mozoomdar.

The High Court declined to interfere in four cases of dismissal by the Magistrate and Deputy Magistrate referred by the Judge—the *first*, because the Judge considered that mere persistence in demand of rent did not amount to trespass justifying the right of private defence as held by the Magistrate — the *second*, because the Judge considered that the Magistrate's reasons, *viz.* (1) want of explanation of the cause of complainant's *presence* on the spot where the alleged assault was committed, (2) want of explanation of *delay* in making complaint, and (3) want of material evidence in the shape of *bruises*, were not sufficient in law to justify a summary dismissal—the *third*, because the Judge considered that the mere assertion of a claim to land by the accused did not justify the dismissal of the criminal charge as to theft of its produce, and that the Deputy Magistrate should be directed to hold a proper enquiry and dispose of the case after recording evidence; —and the *fourth*, because the Judge considered that delay in making complaint was not of itself a legal ground for dismissal, particularly where an explanation of the delay is tendered.

Reference in the 1st Case.—The complainant, a person in the employ of the accused, went to his house and demanded arrears of rent. Accused refused to pay, and referred complainant to a suit under Act X. On complainant persisting, accused forcibly ejected him from the homestead and assaulted him.

The Magistrate held that the accused had not exceeded his right of self-defence, and dismissed the complaint under Section 67.

It is submitted that mere persistence in demand of rent is not either insult, intimidation, or annoyance within the meaning of Section 441; and (2) that, even if the conduct of complainant was such as to amount to constructive trespass, the right of private defence ceased as soon as he had been "chased" off the premises; and that (3) enquiry was necessary to determine whether the violence used was in excess of that necessary and allowable under the circumstances; the Magistrate seems to have been guided solely by the absence of bruises or other marks.

Reference in the 2nd Case.—The complainant stated he was walking about near the house of accused Joygopal, when he met him and assaulted him, because of complainant's having obtained a decree against him.

The record of the examination of complainant (under Section 66) is very brief, and it is not stated that he was asked why he delayed to come to Court, or why he was walking near the house of accused: the Magistrate however probably asked the questions, and was not satisfied with the replies, and did not record them: there are, I think, many reasons for preferring the former custom of a *detailed written complaint in Bengallee.*

The complaint was dismissed for reasons assigned by the Magistrate—(1) want of explanation of the cause of complainant's *presence* on the spot; (2) want of explanation of *delay*; (3) want of material evidence in the shape of *bruises.* It is submitted that these are not sufficient in law to justify a summary dismissal: the 2nd and 3rd are really one—for

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the marks would probably disappear in a week—as I have previously reported to the Honorable Court, the Magistrate is, I have reason to believe, in the habit of dismissing complaints of this nature for this and similar reasons; and it does not appear that (in this case at least) there is any satisfactory and sufficient ground for the dismissal, for it is not unlikely the man was unable to walk at first and resides at a considerable distance from the station.

Reference in the 3rd Case.—The complainant was a servant of one Gobind Deb, and stated that his master's bamboos, fruit, &c., the produce of his homestead, had been taken by the accused (also a Brahmin) who held the adjacent land. The Deputy Magistrate recorded the complaint in six lines, and asked no questions as to the *date* of occurrence, extent of the theft, relationship of the parties, cause of his master not appearing in person, and other points necessary to enable him to exercise a proper discretion under Section 67; he at once summarily dismissed the case, and referred the complainant to the Civil Court.

Apart from these defects in the examination of the complainant, there is, I think, a serious error in *law* in this dismissal. The *mere assertion* of a claim to land by accused does not justify the dismissal of the Criminal charge as to theft of its produce, vide VII* B. L. R., Appellate, page 55,† which is exactly parallel. To refer all such cases to the Civil Court is a virtual denial of justice; and it is submitted for the consideration of the Hon'ble Court that the Deputy Magistrate should be directed to hold a proper inquiry and dispose of the case after recording evidence.

*"A Magistrate ought to hear "evidence in support of a charge "before dismissing the complaint. "A bare assertion by an accused, "charged with committing theft "of a proprietary right in the al-"leged stolen property, is no rea-"son for a Magistrate to refuse to "entertain the charge of theft."

There has been some delay in this reference, owing to the petition being at first under Section 435, and subsequently there has been a delay of 5 weeks in the Magistrate's office (to which the Magistrate's attention has been called.)

The Deputy Magistrate's explanation is annexed: he in no way replies to the remarks made on the above points, and seems to have been partly influenced by the accused being a Brahmin.

† XVI W. R, Criminal Rulings, p. 18.

Reference in the 4th Case.—The complaint, one of theft of crops, was laid before the Magistrate on 22nd November: the complainant alleged that the delay of 12 days in coming to Court was owing to sickness.

The Magistrate disbelieved the plea and dismissed the case at once, on the ground that he should have come at once to his camp in the vicinity.

From the Magistrate's explanation, however, it would seem that his camp on the 10th November was at Guffergong, which is 12 miles from the place of the alleged occurrence but across the river, and on the 11th and 13th his camp was at Rowha (about 8 miles by the map, but according to the Magistrate 1½ hours journey); it also is apparent that the Magistrate was not *always with* his camp, but made excursions, which would not facilitate the petitioner's finding him.

Allowing that the Magistrate was on the 11th November within 6 miles of the place, it is not to be assumed the complainant *knew* of his movements, if he knew of his going into camp at all, he would not know of his *retracing* his steps from Guffergong to Rowha, and might have preferred the going 10 miles in the other direction to the *sudder* station for a certainty to the vague search for the Magistrate's camp, I cannot consider even 6 miles as in the *vicinity*.

If, however, the man was *really sick*, the question of the Magistrate's camp becomes of no moment since he was unable to go to any place. On this point the Magistrate relies only on his own inspection (*vide* explanation): he did not, however, record this on the deposition, and it is submitted he should either have sent the man to the Civil Surgeon for report, or have allowed evidence to be tendered.

There is no limitation in Criminal cases, and it is most unlikely a man would leave his harvesting to come to Court with a false charge.

I submit therefore for the consideration of the Hon'ble Court (1) that delay of itself is not a legal ground for dismissal; (2) that, if an explanation of the delay is tendered, it should at least receive consideration; (3) that the Magistrate's argument from his camp being in the vicinity, is unsound.

Judgment of the High Court.

Markby, J.—We do not think we should be justified in interfering in either of these four cases. We do not think we are in a position to say that, as a matter of law, the Magistrate in either case acted illegally in dismissing the cases.

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The 16th December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Theft—False Charge.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Midnapore in the case of

Bishoo Barik.

Where a charge of theft was reported by the Police to be false, HELD that the Magistrate ought first to have enquired into the charge of theft and passed some orders upon it before proceeding under Section 211 of the Penal Code to enquire into the offence of false charge.

Statement of the Case.

In appeal from a conviction under Section 211, Indian Penal Code, this Court quashed the conviction recording the following observations:

"I regret to say that I think I am compelled to quash this conviction upon a technical ground.

The charge made by the appellant was one of theft before the Police, who reported it false; thereupon the Magistrate instituted proceedings under Section 211, Indian Penal Code, on the 1st July.

But upon the 5th July the appellant appeared in Court, and formally renewed the charge.

This petition was ordered to be brought on at the hearing of the case under Section 112, Indian Penal Code, but subsequently no orders were passed upon it, and it has not been disposed of.

The charge was one which could not be dismissed without inquiry, and in point of fact the accusation was still pending when the appellant was convicted.

Under these circumstances I think the indictment for falsely charging cannot be sustained, and I must quash the conviction, and direct the release of the appellant.

The Magistrate must pass a judicial decision upon the charge of theft after hearing the appellant's evidence, and thereafter, if necessary, proceed under Section 211, Indian Penal Code.

Remarks by the Sessions Judge.

The proceedings were instituted on the 1st July, and hearing fixed for 14th. On the 5th, convict complained under Section 66, and was examined, but no order made under Section 67. On the 7th, convict was admitted to bail, and on the 14th the accused appeared and was examined, and this case under Section 211 made over to the Joint Magistrate.

The Police report being no evidence, the Magistrate had nothing before him on the 14th but the convict's examination and that of his accused. Under such circumstances he was bound to proceed, under Section 67, Criminal Procedure Code. The convict had a right to an adjudication under that Section upon the point whether there was sufficient ground for proceeding.

The mere order of reference of the charge under Section 211 left the convict's charge pending, and invalidates the subsequent proceedings against him.

I note the cases at 8. W. R., 12; 10 W. R., 61; and 11 W. R., 54; also 13 W. R., 37; 15 W. R., 53; also 2 W. R., 47; 7 W. R., 45, 47; and 15 W. R., 87; 16 W. R., 18.

Judgment of the High Court.

Kemp, J.—We think that the procedure suggested to be followed by the Judge,—*viz.*, first to enquire into the charge of theft and pass some orders upon it before proceeding under Section 211 to enquire into the offence of false charge,—was, under the circumstances of this case, a proper procedure.

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The 16th December 1871.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Theft—Julkur Rights.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of East Burdwan.

Khetter Nath Dutt

versus

Indro Jalia and others.

Inability to prove a prescriptive right to fish within certain limits free from payment of rent, is quite distinct from the want of right of any kind to fish therein, rendering a person so fishing liable to be brought up for the theft of fish taken by him.

Reference.—THE prosecutor charged the accused with theft of fish taken by him from that part of the river over which the prosecutor exercises proprietary rights. The Deputy Magistrate of Culna, before whom the case came, has dismissed the charge, because he considers that the decision of the High Court upon which the prosecutor relies as proof of his proprietary right is a qualified one, and does not rule that the fishermen have no right to fish in the portion of the river under dispute in the civil suit.

I consider that the Deputy Magistrate is in error in holding this view. I think that the decision of the High Court clearly establishes that the accused have no right to fish in the part of the river Ganges specified. In the words of Mr. Justice Kemp "the Sub-"ordinate Judge found on the evidence that "the two julkurs in dispute had been settled "by or purchased from the Government, and "that the defendants were entitled to the "exclusive right of fishing in these julkurs." That finding was upheld by the High Court. It seems to me that a "Jalia" (one of the plaintiffs in that case) who, after having been declared by the highest Court in the country to have no right to fish in these waters, continues to fish against the proprietor's will is liable to be brought up for the theft of the fish he has taken. To hold otherwise is to drive the prosecutor again into the Civil Court, although it has already been decided between him and the accused that the latter has no right to fish in these waters. I think that the ruling in the case of the Queen *vs.* Kalichurn Misser, page 55, Vol. VII, B. L. R., Appendix,* supports my view of the law. As urged before me, the effect of the Deputy Magistrate's finding is to drive the prosecutor into the Civil Court to establish a right which the High Court have already found that he exercises, and has a right to exercise, and to encourage the accused to continue to fish in waters to which they have no right.

I think that the Deputy Magistrate should be directed to try the accused upon a charge of theft.

Judgment of the High Court.

Kemp, J.—We take the same view of this case as the Deputy Magistrate has done.

The decision of the High Court, referred to by the Deputy Magistrate and Sessions Judge, was to the effect that the fishermen, plaintiffs in that case, had not established as against their zemindar, the defendant in the same case, a prescriptive right to fish within certain limits free from payment of rent.

We did not find that the fishermen had no right of any kind to fish in the river. What we decided was that they had not proved a right to fish free from payment of rent either by grant or by user for such a lengthened period as to raise the presumption of a grant.

The Deputy Magistrate's decision, dismissing the charge of theft, appears to us to be a proper one. The papers are returned.

* *Ante*, p. 18.

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The 20th December 1871.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Jurisdiction—Sections 23D and 66B and Chapter XX Code of Criminal Procedure—Plea of Want of Jurisdiction.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure, by the Officiating Sessions Judge of Tirhoot.*

Messrs. Macdonald and Macrae

versus

Mr. Riddell.

Mr. R. T. Allan for Mr. Riddell.

The power of a Magistrate to delegate the receiving of complaints under Section 66B, Code of Criminal Procedure, is not equivalent to the power of the Local Government to invest with local jurisdiction under Section 23D; and no Magistrate can act under Chapter XX, who has not been legally invested with local jurisdiction.

No order of the Local Government under the latter Section can legally have retrospective effect.

A plea of want of jurisdiction may be taken in the High Court, though not taken below.

Ainslie, J.—THIS is a reference from the Officiating Sessions Judge of Tirhoot, who proposes that an order made by the Joint Magistrate of that District, under Section 308 of the Criminal Procedure Code, dated 18th August 1871, should be quashed for want of jurisdiction. He cites the case reported in XV Weekly Reporter, Criminal Rulings, page 36, as authority for the view taken by him. Mr. Allan appeared in support of the Joint Magistrate's order, and contended that the Joint Magistrate was in fact in charge of the Sudder Sub-division of the District, and therefore competent to proceed under Section 308 ; and that even if this were not the case, the objection was taken too late, and should not prevail.

It appears that, by an order of the Government of Bengal, Joint Magistrates were put in charge of the Sudder Sub-divisions of the Districts to which they were appointed, but by a subsequent order dated 10th May 1871 this arrangement was set aside. This last order was followed by correspondence between the Magistrate of Tirhoot, the Commissioner of Patna, and the Government of Bengal, which terminated with a letter of the 24th September 1871 to the Commissioner, from which the following is an extract :—

Para. 2.—"In reply I am desired to say with reference to para. 14 that a Sub-divisional officer may make over cases to other Subordinate Magistrates placed under him under Act VIII of 1869, Section 36 ; and that when the Magistrate is absent and the Joint Magistrate or other officer is put in charge, the Lieutenant-Governor thinks that that officer may be considered to be Sub-divisional officer *pro tempore :* should any doubts arise as to the legality of this course, the difficulty may be easily obviated by the Magistrate himself prescribing what officers are competent to hear what cases (according to the description of cases or the locality) so that the transfer of such cases may not at all be necessary."

On the 25th May 1871 the Officiating Magistrate, Mr. Worsley, had placed Mr. Hodgkinson, the Joint Magistrate in charge of the Sudder Sub-division, and on the 1st September Mr. Halliday, on receipt of the Commissioner's letter of the 29th August 1871, made an order to the same purport with retrospective effect to the 25th May. The order under Section 308 was made on the 18th August 1871.

Looking at the terms of Section 23 D of the Criminal Procedure Code, which runs thus,—" the Local Government may invest

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any Magistrate with the local jurisdiction in a particular part of a District declared by Section 18 to be deemed a division of a District, and may from time to time alter the limits of such local jurisdiction,"—it is clear the Government alone can appoint any Magistrate to the charge of a division of a District. Mr. Allan contended that under Section 66B. the Magistrate was authorized to empower Mr. Hodgkinson to entertain all cases on complaint preferred directly to himself or on the report of a Police officer, and that the Joint Magistrate was therefore competent to receive and deal with the complaint of Mr. Riddell in the present case. But we think that the word "complaint" must here be limited to complaints of offences punishable by a Magistrate with fine or imprisonment. A comparison of the opening Sections of Chapters XII, XIV, and XV of the Criminal Procedure Code with the first Section of Chapter XX clearly shows this. In Section 179 complaints to a Magistrate having power to commit persons for trial before the Court of Sessions, and in the 248th and 257th Sections complaints to a Magistrate, *i. e.* any Magistrate authorized to receive complaints of offences triable by the Court of Sessions, or punishable by the Magistrate with imprisonment for a term exceeding or not exceeding six months, are spoken of; but in Section 308 the words are "whenever the *Magistrate of a Distirct or of a division of a District considers* that any unlawful obstruction or nuisance should be removed * * * he may issue an order, &c." The source of his information may be a complaint by some private individual, using the word 'complaint' in its common acceptation; but it is not because he has a complaint before him that he has authority to proceed under Chapter XX, but because he, being the officer specially entrusted with the local jurisdiction in the whole or the specific part of a District, considers it necessary. The power of a Magistrate to delegate the receiving of complaints under Section 66B is not equivalent to the power of the Local Government to invest with local jurisdiction under Section 23D, and no Magistrate can act under Chapter XX who has not been legally invested with local jurisdiction. If the orders of Government of the 24th September 1871 distinctly invested Mr. Hodgkinson with local jurisdiction, which certainly they do not do, we could not hold that there was any thing in them to warrant their having retrospective effect, and neither Mr. Worsley's order of the 25th May 1871, nor Mr. Halliday's order purporting to have retrospective effect of the 1st September 1871, are of any legal effect as far as concerns the matter now before us.

The objection taken to the ground on which the Judge questions the jurisdiction of Mr. Hodgkinson to make the order of the 18th August 1871, must therefore fail.

As to the second part of Mr. Allan's contention, we are of opinion that the plea of want of jurisdiction may be taken now, though not taken below. Neither the ignorance and consequent silence of the parties, nor their consent, can vest a Magistrate with powers which the law does not give him. In Archbold, p. 111 (Ed. 1856), it is said "but, although the defendant may plead to the jurisdiction in such a case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the Court, the defendant may take advantage of this under the general issue; or if the objection appear upon the face of the record, he may demur, or (it should seem) move in arrest of judgment or bring a writ of error."

We concur with the Sessions Judge, and set aside the orders of the Joint Magistrate dated 18th August 1871 in this case, for want of jurisdiction.

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Court Fees' Act—Plaint—Jurisdiction—Moonsiff—Declaratory decree.

Civil letter No. 1701, *dated the* 1*st June* 1871, *from the Officiating Registrar of the High Court, Appellate Side, to the Judge of* 24-*Pergunnahs, dated Calcutta, the* 1*st June* 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

I AM directed to acknowledge the receipt of your letter No. 223, dated the 8th ultimo, in which you report the refusal by the Subordinate Judge to receive a plaint endorsed on a stamp of 10 rupees under Clause 3 Articles 17 of the Court Fees' Act, from a suitor seeking to establish his propietory right in 2,300 beegahs of land valued at rupees 4,600, and in which you suggest a more full explanation of the intention of Circular Order No 11, dated 14th May 1870, because it is quoted by the Subordinate Judge as a warrant for his procedure.

2. I am to observe in reply that you are right in supposing that a Moonsiff has not jurisdiction in a suit the subject matter of which is the right to receive the rents of 2,300 beegahs of land valued at rupees 4,600 (see Section 20 Act VI of 1871). And a decree establishing the ownership and right to the present enjoyment of property as against a person previously in possession cannot be treated as a mere declaratory decree; nor can the prayer of the plaint for such a decree be treated as a prayer which asks no relief. The Court has no doubt that the full amount of stamp duty on the valuation of the property is demandable.

3. The plaint ought accordingly to have been received by the Subordinate Judge who ought to have required the plaintiff to put in the additional fee.

4. The Court is not of opinion that the misconception arising in the mind of a particular Judge makes it necessary to explain the Circular Order.

An original judgment once delivered is final in regard to the power to correct it—Evidence as to good and bad character produced for or against the accused—Previous conviction of accused—Cross-examination—Evidence—Signature by Magistrate—Charge sheets—How charges should be drawn—Extortion—Section 196, Code of Criminal Procedure—Section 383, Penal Code.

Extracts (paras. 1 *to* 7, *and* 10*) from Criminal letter No.* 497, *dated the* 14*th June* 1871, *from the Registrar of the High Court, Appellate Side, to the Magistrate of Monghyr.*

(Criminal Side.)

Present:

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

IN acknowledging the receipt of your letter No. 436, dated the 6th ultimo, forwarding

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copy of a letter from the Joint Magistrate of * * * * and asking the Court to call for the records of the case of Dillawur Hossein under Section 404 of the Code of Criminal Procedure with a view to passing orders thereon, as you concurred with the Joint Magistrate in considering the decision of the Sessions Judge wrong in law, I am directed to observe as follows:—

2. With advertence to para. 4 of the Joint Magistrate's letter the Court is of opinion that he cannot write "a sort of codicil," as he calls it, to his judgment. His original judgment once delivered was final in regard to his power to correct it.

3. The Joint Magistrate states that the original and amended judgment were delivered simultaneously and as one. Granting that they were read, if read at all in Court consecutively, they must be taken as they stand, *i. e.*, first the judgment of the 20th and then the amended judgment of the 21st. Thus according to the Joint Magistrate, the prisoner was formally convicted, and then a minute or two later discharged as not put on trial at all. Whether the 2nd charge was, as the Joint Magistrate holds, "*ipso facto* null and void or not, was a matter that he should have determined before he proceeded to record a conviction on it.

4. The Joint Magistrate in para. 6 asks the Court whether he had power to correct his own error or not, and says that "one thing is clear,—that having discovered it, I was not bound to make it worse by convicting the prisoner on a charge which I believed to be bad in law." The Court observe that as a matter of fact, the Joint Magistrate did not correct his own error and that he did convict the prisoner, whether he believed the charge to be bad in law or not. All that he did, as far as appears from the record, was to alter one passage in his judgment of the 20th October which stood,—"I pass to the *second head of the charge* relating to, &c.," by substituting for the words underlined the words "part of the evidence" and then to add what he terms "a sort of codicil" which was contradictory of the judgment. From this it may be inferred that the Joint Magistrate had intended to alter his judgment so as to make it accord with the conclusion he had finally arrived at, but it is certain that he did not take the proper steps to carry out his intention effectually. Possibly the Joint Magistrate also withdrew a charge sheet from the record, as no charge in respect of the 28 head of cattle impounded from Kooshaltola is to be found in the record. If he did this, he ought not to have done it. But it may be that he had never framed a second formal charge, but had proceeded with the trial without it.

5. Be this as it may, it is evident that the Joint Magistrate did not take proper steps to amend the judgment he was going to deliver before delivering it, and that he allowed such passages as the following—"whatever doubt I may have had as to the truth of Dilgunjun's complaint, *of this part of the case* I have none whatever," and "on the grounds and for the reasons above detailed, I have no hesitation in *convicting the prisoner on both counts*" to stand unaltered in the judgment actually delivered: and therefore whatever his intention may have been, he did not in fact correct any error into which he had fallen.

6. The Joint Magistrate in his "sort of codicil" records as follows:—"The evidence, "however, recorded relating to this act of "prisoner, is still of great importance as dis-"crediting the prisoner's general plea of "integrity, as shewing that he was in the "habit of of tampering with his accounts, and "extorting more than his legal dues;" and in his letter (para. 6) he speaks of this evidence

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as having an indirect influence on the case. The Court has to observe on this that the Joint Magistrate was altogether wrong in treating this evidence as legally admissible. Taylor (Section 327) says :—" Although the defendant from motives of humanity is allowed this reasonable indulgence (*i. e.* to produce evidence of general good character) the prosecutor cannot, in the first instance, have recourse to the same loose testimony as the means of establishing the guilt of the accused: but if, with the view of raising the presumption of innocence, witnesses to character are *called for the defence*, the Counsel for the Crown may then rebut this presumption by *cross-examining* the witnesses either as to *particular facts*, or if they deem it essential as to the grounds of their belief. It seems also that on principle, evidence of *general* bad character would in such case be admissible, though it is seldom, if ever, resorted to in practice. In most trials for felony and in some for misdemeanour, if the defendant endeavours to establish a good character, either by calling witnesses himself or by cross-examining the witnesses for the prosecution, the prosecutor is at liberty in answer thereto to give proof of the prisoner's *previous conviction.*"

7. The Court wishes to point out to the Joint Magistrate that evidence of particular facts tendered to rebut evidence of general good character ought to be either such as is extracted by cross-examination from the defendant's own witnesses or in the shape of proof of a previous conviction, and that it is not open to the prosecutor to try a separate charge on a separate particular fact in respect of which the accused is not bound to answer in order to use as if it amounted to a previous conviction; and further that when the prosecutor adduces evidence of bad character to rebut evidence of good character other than such evidence as above referred to, it must be of the same nature as that which the accused is entitled to give, namely, evidence of *general* character. Taylor, in Section 336, says :—" The enquiry too must be confined, except where *intention* forms a material ingredient in the offence, to the *general* character of the prisoner and must not condescend to *particular* facts." Now extortion is an offence *per se* and not one of those acts which may or may not be criminal according to the intention of the doer.

* * * * * *
* * * * * *

10. In conclusion, the Court regrets to observe that Mr. * * * 's proceedings show a want of attention to details.

The first examination of Dilgunjun Singh on the 28th June is stated to have been taken down before him, but not in his own hand owing to his inability to record it. It has been left unsigned, although Section 196 of the Criminal Procedure Code specifically provides that evidence so taken shall be signed.

The re-examination of the prosecutor is in the Magistrate's own hand, but bears no date.

The charge sheets in both cases bear no dates, and although the examples in Chapter XIII of the Procedure Code and the printed forms issued by the Court do not specially provide for the insertion of the date, it should always be (and the Court believes that it usually is) entered.

The charges themselves are wanting in precision—they do not show what was extorted, or from whom or by what means it was extorted.

It is not required that charges should be drawn with excessive minuteness, but still

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quite distinctly so that parties may know exactly what has to be dealt with.

In the case reported in V Weekly Reporter, Criminal Rulings, p. 7, it was observed —" we are not acting under a procedure in " which no amendment is allowed and any " variance from precise charges would be " fatal. Under our procedure, one count " charging each specific offence and describ- " ing it with a reasonable degree of certainty " would seem to suffice."

On the other hand, in a case reported in X Weekly Reporter, Criminal Rulings, p. 38, Mr. Justice Phear observed :—" It is only fair " to the prisoner that the charge which is to " stand for ever on record against him, should " be made as definite and specific as it reason- " ably can be."

The illustrations under Section 383 of the Penal Code show that extortion may be committed in many ways and that the injury threatened may be either to the person from whom something is extorted, or to some other.

A simple charge that on such a date and at such a place A committed extortion does not show whether he has to depend himself on a charge of extorting money from Z by threatening to publish a defamatory libel concerning Z unless Z gives him money (Illustration *a*), or whether he has to answer to a charge of extorting a promissory note from X by threatening to keep X's child in wrongful confinement (Illustration *b*); and it cannot be said that there is any reasonable degree of certainty about it.

Jurisdiction — Sessions Judge has power to send for any record of any case decided by Magistrate of the District as a Court of appeal.

Criminal letter No. 542, *dated the* 28*th June* 1871, *from the Officiating Registrar of the High Court, Appellate Side, to the Sessions Judge of Sylhet.*

(Criminal Side)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

I AM directed to acknowledge the receipt of your letter No. 13, dated 1st instant, in which, at the request of the Officiating Magistrate, you solicit a decision on the question whether, under the circumstances therein described, you had the power to call for the record of a case in which an appeal had been preferred to the Officiating Magistrate. In reply, I am to state that in the opinion of the Court your view is correct.

2. The Court is of opinion that the Court of the Magistrate of the District is, within the meaning of Section 434, Code of Criminal Procedure, immediately subordinate to the Court of Sessions, and that the Sessions Judge has full authority to send for any record of any case decided by the Magistrate of the District as a Court of appeal for the purpose of examining, and, if necessrry, referring them to the High Court.

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An appeal lies from a Magistrate's sentence of 14 days' imprisonment and fine under Section 379 Penal Code.

No. 502.

From the Registrar of the High Court, Appellate Side, to the Sessions Judge of Rungpore, dated Calcutta, the 16th June 1871.

(Criminal Side.)

Present:

The Hon'ble H. V. Bayley and the Hon'ble W. Ainslie, *Judges.*

In forwarding copy of a petition of Alee Mohamed and Roy Mohamed, Appellants, in Criminal Appeal No. 9 of 1871, in your Court, against the order of the Deputy Magistrate of Rungpore, convicting the said petitioners under section 379 of the Indian Penal Code, and sentencing them to 14 days' inprisonment *and* a fine of 10 rupees, or in default of payment thereof, 10 days' rigorous imprisonment each, I am directed to state that, in the Court's opinion, an appeal will lie in the case in question, and that you should entertain the appeal.

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CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Cancels Circular No. 7 dated 22nd March 1871, and restores Circular No. 1 dated 4th January 1871, regarding the transmission of records by the post.

CIVIL CIRCULAR No. 16

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and District Magistrates, dated Calcutta, the 22nd May 1871.

(Civil and Criminal Sides.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, A. G. Macpherson and E. Jackson, *Judges.*

THE Court having been informed by the Officiating Post Master General of Bengal that he has, by a Circular No. 3 dated 24th April 1871, cancelled as erroneous his former Circular No. 95 dated 30th December 1870, of which a copy was circulated by the Court with its Circular Order No. 7 dated 22nd March 1871,* in supersession of its former instructions (Circular Order No. 1 dated 4th January last) ;† and as it now appears that those instructions were correct, the Circular Order of the 22nd March 1871, No 7, is hereby withdrawn, and the Court directs that the instructions conveyed in its Circular Order of the 4th January 1871, No. 1, be observed as if they had never been superseded.

* 15 W. R., Civil Circulars, p. 12.

† 15 W. R., Civil Circulars, p. 1.

Circulates rules for the admission of appeals.

CIVIL CIRCULAR No. 17.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Subordinate Judges, dated Calcutta, the 23rd May 1871.

(Civil Side.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, L. S. Jackson, J. B. Phear, A. G. Macpherson, E. Jackson, F. A. Glover, Dwarkanath Mitter, W. Ainslie, G. C. Paul, and O. C. Mookerjee, *Judges.*

IT having come to the knowledge of the Court that memoranda of appeals are frequently filed in the Lower Appellate Courts, bearing the endorsement of pleaders who, when the appeal comes on for hearing, betray a more or less complete want of acquaintance with the case, and even with the grounds of appeal, to the loss of public time, the detriment of suitors, and the utter neglect of their professional duty, the Court lays down the following rules, to which the sanction of the Governor-General in Council has been obtained, for the guidance of Subordinate Courts in the admission of appeals.

RULES

FOR THE

Guidance of Subordinate Courts in the Admission of Appeals, made by the High Court and sanctioned by the Governor-General in Council under Section 15 *of* 24 *and* 25 *Victoria, Chapter* 104.

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1. ALL petitions of appeal in the Subordinate Appellate Courts shall be presented in open Court either by the party in person, or his "recognized" agent, within the meaning of that term in Section 17, Code of Civil Procedure, or by a pleader.

2. In every case in which the petition is presented by a pleader, the grounds of appeal shall be drawn and signed by a pleader who, at the foot of the petition of appeal, shall subscribe the following statement:—

"I certify that I have examined the record in this case, and that, in my opinion, there are good grounds, as above set forth, for this appeal; and, having prepared it, I undertake to appear and support the appeal before the Appellate Court."

3. In every case in which the petition of appeal is presented by the party in person or by a recognized agent, and a pleader is afterwards retained by such party to support his appeal, the pleader before being allowed to appear to support the appeal shall subscribe and file in Court the following statement which shall be annexed to the petition of appeal:—

"I certify that I have examined the record and the grounds of appeal in this case, and that, in my opinion, the grounds of appeal are good, and I undertake to appear and support them before the Appellate Court."

Cancels 7 Circular orders which have ceased to be necessary since the new Registration Act VIII of 1871 came into force.

CIVIL CIRCULAR ORDER No. 18.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 6th July 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

THE Circular Orders noted on the margin having ceased to be necessary since the 1st July 1871, when the "Indian Registration Act, 1871," came into force (*vide* Section 1 Act VIII of 1871), are hereby cancelled, except in so far as they superseded any orders of prior date.

No.	21,	dated 27th July	1863.
"	24	" 19th June	1866.
"	37	" 20th Sept.	1866.
"	39	" 29th Sept.	1866.
"	8	" 27th Feb.	1867.
"	7	" 12th Mar.	1870.
"	14	" 7th June	1870.

Calls attention to Section 243 Act VIII of 1859 regarding the appointment of a Manager for property which has been attached.

CIVIL CIRCULAR ORDER No. 19.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower and Extra-Regulation Provinces, dated Calcutta, the 11th July 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

THE High Court, having recently had under consideration a number of cases in which it plainly appeared that the provisions of Section 243 of the Code of Civil Procedure had been abused, thinks it proper to call the attention of the Civil Courts generally to the purpose for which that Section was intended, and to prescribe certain rules for the better carrying out of that purpose.

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2. By Section 243 Act VIII of 1859, it is enacted that "when the *property attached* shall consist of debts due . . . . . or of lands, houses, or other immoveable property, it shall be competent to the Court to appoint a Manager of the said property," &c., &c.

3. The power to appoint a Manager is consequently given to the Courts in respect of property belonging to the party liable under the decree, which the execution-creditor *may have attached* with a view to sale: and Section 243 has no application whatever except to property which is *actually under attachment.*

4. It is plain that what the Legislature intended by this and some analogous provisions of the Code was to prevent needless sacrifice of the judgment-debtor's property by a forced sale, and at the same time to provide for the satisfaction, within a reasonable time, of the creditor's claims.

5. The late Sudder Court, in paragraph 54 of their Circular Order dated 29th July 1859, directed that care should be taken not to exercise the power given by Sections 243 and 244, "so as to inflict an injury on the decree-holder."

6. While, therefore, a judicious use of the power conferred by the Section may be extremely beneficial to the judgment-debtor without unduly postponing the creditor's remedies, an order placing property under management which does not provide for a timely liquidation of the debt is an unjustifiable wrong upon the creditor and benefits no one except the Manager.

7. An essential element in such arrangements, moreover, is the economical administration of the property.

8. The appointment of a Manager who is too highly paid in proportion to the value of the property, or who is wanting in the proper qualifications, withdraws an undue amount of the assets from the purpose for which they were attached, or endangers the full realization of those assets.

9. It is further to be borne in mind that an order made under Section 243 concerns only the particular attaching creditor or creditors who may have been before the Court at the time when the order was made, and will not affect the rights of other creditors to attach the same property. Should a second attaching creditor apply for an order for sale, the existence of an order appointing a Manager seems to afford no valid reason for refusing the application. Indeed it may well be that an arrangement which was right and reasonable in view of the liabilities of the judgment-debtor which were before the Court when the order appointing a Manager was made, would be unreasonable with reference to the rights of other creditors seeking to enforce demands under decrees against the same debtor, whose remedies might be indefinitely postponed, while the first attaching creditor might be getting payment in such a manner as to suit his own convenience and the interest of the debtor.

10. The following rules are to be observed henceforward in all cases where it is proposed to place under management the immoveable property of judgment-debtors which is already under attachment:—

I. The judgment-debtor is to be strictly examined touching the profits and out-goings, such as Government revenue, putni rent, or the like, the cost of management, and the existing condition of the property.

II. The execution-creditor or his pleader is to be asked by the Court whether he consents or objects to the arrangement proposed; and such consent or objection, with the grounds (if any) of objection, is to be recorded.

III. If the creditor object and the objection be over-ruled, the Court is to record, in the handwriting of the Judge, an order setting forth its reasons for placing the property under management, the amount of the debt, the profits or income of the property, and the period within which, by estimate, the debt will be liquidated. Such period, in ordinary cases, ought not to exceed two or three years. When the order is made by consent, it will only be necessary to record the last-mentioned particulars.

IV. The Court should then proceed to appoint a Manager with such establishment (if any) as may be necessary, with such

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remuneration as it may think proper. The expenses of management, however, should not, except under very special circumstances, exceed 10 per cent. of the gross collections or profits; and security should be required not less in amount than half the yearly collections.

V. Notice of the intention to appoint a Manager should be given at the Court House and on the property at least 15 days beforehand, and candidates for the office should be invited.

VI. No person should be appointed Manager, (unless with the approval of the District Judge) who cannot read the language in which the accounts of the property are kept and the ryots' engagements are written, or who cannot give the security required by the Court.

VII. Whenever property is placed under management, or a Manager is appointed, if the Court, making the appointment be not the District Court the order and the appointment should be reported to the Judge of the District Court, who, if he disapprove thereof, may signify such disapproval to the Court making such order or appointment; and if such Court shall not satisfy the District Judge thereupon, the Judge should report the matter for the information of the High Court.

VIII. Whenever application is made by subsequent or other judgment-creditors for the attachment and sale of property already under management, the Court should call upon the judgment-debtor to show cause why such property should not be sold, and to give notice of such application to all previous attaching creditors; and unless it can be shown that, regard being had to all execution claims upon the property or against the judgment-debtor, the management can still be properly continued, such property ought then to be brought to sale,—the earliest attaching creditor being of course entitled to the benefit of Section 270.

IX. Any execution-creditor who has attached the property under management may at any time apply to the Court to put an end to the management, and such application should be duly considered.

Calls for a returns of the duty levied on Probates and Letters of Administration under the Succession Act, and on Certificates under Act XXVII of 1860.

CIVIL CIRCULAR No. 20.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 13th July 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

At the instance of His Excellency the Governor-General in Council, the High Court requests all District Judges and Judicial Commissioners to submit to this office, in the form appended hereto, returns of duty levied on probates and letters of administration granted under Part XXXI of Act X of 1865, and certificates issued under Act XXVII of 1860.

2. The statistical information required for these returns should be preserved in registers opened for that purpose, from the 1st July 1871, and the first return should embrace the six months ending with December of the current year. Subsequent returns should be annual.

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Probates and Letters of Administration and Certificates issued in the District of

Declared value of Assets of Estate.	Number of Probates or Letters of Administration with will annexed.	Amount of Court fees paid.	Number of Letters of Administration without Will annexed.	Amount of Court fees paid.	Number of Certificates under Act XXVII of 1860.	Amount of Court fees paid.	Total.		Number of Letters of Administration cancelled, and fresh letters issued in lieu of the original.	Remarks.
							Number of Probates, Letters, and Certificates.	Amount of Court fees paid.		

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Explains a previous Circular and states that the charge for sending records should be borne by the Courts, and not by the Post Office.

CIVIL CIRCULAR No. 21.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Criminal Courts, dated Calcutta, the 17th July 1871.

(Civil and Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

In continuation of Circular Order No 16, dated the 22nd May last† and in explanation of Circular Order No. 1, dated the 4th January 1871‡ the Court hereby notifies that the intention of the Government of India (as since* more fully expressed) in deciding that the postal charge for transmitting judicial records shall be borne by the State, is that the charge for sending records under Section 343, Act VIII of 1859, which it has been the practice in some places to lay upon the parties appealing, shall be borne by the Courts themselves, and not by the Post Office.

* *Vide* Letter No. 569, dated 19th May 1871' from Under-Secretary, Government of India, Financial Department, to Director General of the Post Office.

† *Ante*, p. 1.

‡ 15 W. R., Civ. Cir., p. 1.

Extends to Small Cause Courts Circular No. 18, dated 23rd June 1870, regarding furnishing copies of documents &c. to applicants, so far as the same may be applicable.

CIVIL CIRCULAR No. 22.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Courts of Small Causes, dated Calcutta, the 18th July 1871.

(Civil Side)

Present:

The Hon'ble J. P Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, A. G Macpherson, and E. Jackson, *Judges*.

All Judges of Courts of Small Causes, subject to the control of the High Court under Section 4 Act XI of 1865, are hereby directed to carry out in their Courts the provisions of Circular Order No. 18, dated the 23rd June 1870,* as far as they may be applicable.

Circulates Rules regarding the appearance in suits of the Government Pleaders on behalf either of the Government or of Government servants.

CIVIL CIRCULAR ORDER No. 23.

From the Officiating Registrar of the High Court of Judicature at Fort William in

* 14 W. R., Civ. Cir. p. 2.

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Bengal, to all Civil Courts, Lower Provinces, dated Calcutta, the 25th July 1871.

(Civil Side).

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, J. B. Phear, A. G. Macpherson, E. Jackson, F. A. Glover, W. Ainslie, and O. C. Mookerjee, *Judges.*

THE following Rules are circulated for the guidance of all Civil Courts subordinate to the High Court :—

RULES.

1. In every case in which the Government Pleader shall appear for the Government (whether for the Government as a party on its own account or for the Government as undertaking, under the provisions of Section 70 of Act VIII of 1859, the defence of a suit against an officer of the Government), the Government Pleader shall, in lieu of a vakalutnamah, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the Form annexed hereto.

2. In every case in which the Government Pleader shall appear on behalf of any officer or servant of the Government, other than cases in which the Government has, under Section 70 of Act VIII of 1859, undertaken the defence of the suit, such Pleader shall file a vakalutnamah in the same manner as if he were not the Government Pleader.

FORM OF MEMO. REFERRED TO IN THE FIRST OF THE ABOVE RULES.

Title of the suit, &c

I, A.B., Government Pleader, appear on behalf of the Secretary of State for India in Council (*or*, the Government of Bengal, *or as the case may be*) respondent (*or* &c.) in the suit :

or, on behalf of the Government (which under Section 70 of Act VIII of 1859 has undertaken the defence of the suit), respondent (*or* &c.) in the suit.

Requests Judges to report for the sanction of the High Court all cases in which a Serishtadar is placed in charge of the current duties of a Moonsiff's Court.

CIVIL CIRCULAR MEMO. No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 5th August 1871.

(Civil Side.)

Present :

The Hon'ble L. S. Jackson, *Judge.*

THE Court finds it necessary to point out that in all cases in which the Sherishtadar is placed in charge of the current duties of a Moonsiff's Court during the temporary absence on leave or otherwise of the Moonsiff, or pending the arrival of his *locum tenens* or successor, the fact should be reported for the sanction of the Court in the same manner as is required to be done when a District Judge appoints an Officiating Moonsiff under Section 9 of the Bengal Civil Courts Act, 1871.

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Asks Judges to inform the Court when they consider it advisable that a Moonsiff should be invested with jurisdiction of a Court of Small Causes up to the amount of fifty rupees.

CIVIL CIRCULAR ORDER No. 24.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 12th August 1871.

(Civil Side.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson, A. G. Macpherson and E. Jackson, *Judges.*

ALL District Judges and Judicial Commissioners are hereby directed to inform the Court when, for any special cause, they consider it advisable that a particular Moonsiff should be invested, under Section 29 of the Bengal Civil Courts Act, 1871, with the jurisdiction of a Court of Small Causes up to the amount of *fifty* rupees; stating both the local circumstances which appear to call for the measure, and the Moonsiff's fitness to exercise such powers. Among the circumstances to be stated are the following: whether there is more than one Moonsiff at the station indicated; and if so, what the distribution of business between the Moonsiffs is; and within what limits it is intended that the proposed jurisdiction should be exercised.

Gives instructions as to the preparation of statements A, B, and C prescribed by Circular No. 31, dated 4th November 1870, laying down new quarterly returns.

CIVIL CIRCULAR ORDER No. 25.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 12th August 1871.

(Civil Side.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson, A. G. Macpherson and E. Jackson, *Judges.*

THE following instructions should be carefully observed in the preparation of Statements A, B and C, prescribed by Circular Order No. 31, dated 4th November 1870.*

2. In every column bearing the superscription "instituted or received by transfer," the number of cases *filed in the Court whose work is represented* as distinguished from the total number requiring to be shown in the column as received by such Court, should be entered under such total in red ink, in the manner indicated on the margin.

CLASS OF COURTS.	Instituted or received by transfer.
Subordinate Judge ..	26 15
Moonsiff of ..	59 20
Moonsiff of ..	60 30
TOTAL ..	139 65

3. Similarly, in every column with the heading "disposed of by final order or transfer," the number of cases *actually decided by the Court whose work is under report*, as distinguished from the total number (which includes transfers) intended to be shown in the column in connexion with such Court, should be entered under such total in red ink.

CLASS OF COURTS.	Disposed of by final order or transfer.
Subordinate Judge ..	40 10
Moonsiff of ..	45 4
Moonsiff of ..	35 6
TOTAL ..	120 20

4. In both the above paragraphs, the object, it will be seen, is to distinguish cases newly instituted and actually decided from mere transfers.

* 14 W. R., Civil Circulars, p. 16.

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Directing a certain percentage to be deducted from proceeds of sales in execution of decrees and credited to Government.

CIVIL CIRCULAR ORDER No. 26.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Courts, dated Calcutta, the 5th September 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

THE Court are pleased to direct that when property is sold in execution of a decree, a deduction, at the rate of one anna in the rupee or six and a quarter per cent., shall be made from the proceeds of sale and credited to Government, whether the sale is effected by the Nazir or other Officer.

2. When, however, the sale is conducted by a Nazir or other Officer (not being a Civil Court Ameen for whom special rules are already in force), a moderate daily allowance should be made out of the percentage above-mentioned, to cover the expense of travelling and the cost which the Officer may be put to by his absence.

Calls for information regarding the transmission of records of Moonsiff's Courts, &c., to the Appellate Courts in the several districts, with a view to carrying out the provisions of Circular No. 17, dated 23rd May last.

CIVIL CIRCULAR MEMO. No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 11th September 1871.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

IN order that there may be as little impediment as possible to the carrying out of the rules promulgated with Circular Order No. 17, dated 23rd May last, the Court propose to give further directions touching the transmission of records to the District Court, or to the Court in which by any order made under Section 22 Act VI of 1871, appeals from the decisions of any Moonsiff may be preferred.

2. The Court therefore desire that you will have the goodness to report, at your earliest convenience, within what period, and at what intervals, it will be practicable to require the transmission of Moonsiffs' records, and of the records of Subordinate Judges at out-stations, to the several Appellate Courts in your district.

3. It is extremely desirable that the period of transmission should in no case exceed fifteen days.

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Small Cause Court Judges to obtain and keep up the "Diary of the Court" prescribed by Circular Order dated 14th February 1870.

CIVIL CIRCULAR MEMO. No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to Judges of Small Cause Courts, dated Calcutta, the 25th September 1871.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

REQUESTS that they will obtain from the Superintendent of Stationery and keep up in their Courts the "Diary of the Court" prescribed by the High Court Circular Order 2 of the 14th February 1870, to be kept up in all Civil Courts subordinate to the High Court.

District Judges to forward to the High Court an impression of the seals of their respective Courts.

CIVIL CIRCULAR MEMO. No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges, dated Calcutta, the 26th September 1871.

(Civil Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

DISTRICT Judges are requested to be good enough to transmit to the Registrar of the High Court, without delay, a carefully taken impression of the seals of their respective Courts.

2. It is requested that the seals be impressed in the centre of the lower half of a sheet of paper of foolscap size, and that the following particulars be briefly stated on the upper portion of the half sheet:—name of Court; date of making the seal; where procured; by whose order, and under what authority.

Forbids the employment of Sherishtadars on the Bench.

CIVIL CIRCULAR ORDER No. 27.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Courts, Lower Provinces, dated Calcutta, the 4th October 1871.

(Civil Side.)

Presen t

The Hon'ble L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

THE Court, having reason to believe that many Judges of all grades sit in Court with their Sherishtadars in attendance, think fit to call the attention of all Judicial Officers to the prejudicial effect of such a course.

First.—It tends to give an erroneous impression of the position and influence of the Sherishtadar.

Secondly.—By the Sherishtadar being kept all day in attendance on the Judge, the Office, the Subordinate Amlah, and the details of business lose almost entirely the benefit of his presumably superior capacity and experience.

2. The Court accordingly forbid the employment of the Sherishtadar on the Bench, and remind all Civil Judges of the regular Courts that his proper place is in the Sherishtah, for the management of which he is more immediately responsible.

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Further instruction in respect to the Forms A, B, and C of the quarterly returns of Civil work.

CIVIL CIRCULAR No. 28.

From the Deputy Registrar in charge of the Office of Registrar, High Court, Appellate Side, to all District Judges and Judicial Commissioners, dated Calcutta, the 12th October 1871.

(Civil Side)

Present:

The Hon'ble F. B Kemp, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges*.

In continuation of Circular Order No. 25, dated the 12th August last, the Court find it necessary to issue the following further instruction in respect to the Forms A, B, C, of the quarterly returns of Civil work.

These statements are mainly intended to exhibit the work of each Court as a whole, and the work of individual Officers should not be distinguished in the body of the returns. And in the columns headed "Instituted or received by transfer," as well as in those headed "Disposed of by final order or transfer," the term *transfer* was intended to relate to those cases only which have passed from one Court to another by an order of the presiding Officer, and not to those which have been left by the presiding Officer to his successor in the same Court when successive Officers have presided in the same quarter. Cases of the latter description may be distinguished by a note in the column of remarks, where the number disposed of by each Officer out of the total in each of the columns indicated ought also to be exhibited.

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Directs Officers to forward to the Government of India in the Military Department a copy of all convictions of persons serving Government in that Department.

CRIMINAL CIRCULAR No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Courts, dated Calcutta, the 17th July 1871.

(Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble L. S. Jackson, A. G. Macpherson and E. Jackson, *Judges.*

In accordance with the wishes of His Excellency the Governor-General of India in Council, the High Court directs that Judicial Commissioners, District Judges and Magistrates will forward to the Military Department of the Government of India, a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a Criminal Court.

Calls attention of Magistrates to Section 237 Act VIII of 1869 prohibiting Police Officers in charge of stations from proceeding in cases where no sufficient grounds appear for inquiry &c.

CRIMINAL CIRCULAR No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Magistrates, dated Calcutta, the 20th July 1871.

(Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

The Court finds it necessary to call the attention of Magistrates to the provisions of Section 137, Act VIII of 1869, which forbid a Police Officer in charge of a station from proceeding with the investigation of any case in which he may consider that there is no sufficient ground for entering on an inquiry, or *that the immediate apprehension of the accused is not necessary for the ends of justice.*

2. If he should be of this opinion, he is not to proceed with the case, but must

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report the substance of the complaint or information for the orders of the Magistrate having jurisdiction.

3. Where a Police Officer in charge of a station is thus precluded from entering upon an enquiry, no other Police Officer is competent to make such inquiry unless he is authorized and required to do so by an order of the Magistrate.

4. The Court desires that the Police may be restrained from entering on inquiries in cases where their voluntary action is prohibited by law; and also cautions Magistrates against the indiscriminate use of Police agency, which is too frequent in some districts, for the purpose of ascertaining matters upon which the Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is especially needful in respect of cases triable under the 15th Chapter of the Code.

Requests Sessions Judges and Magistrates of Districts to inform themselves thoroughly from time to time of the mode in which business is transacted by their subordinates.

CRIMINAL CIRCULAR No. 8.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and District Magistrates, dated Calcutta, the 27th July 1871.

(Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

WITH reference to the altered form of the Quarterly Returns of Criminal business now required from the Magistrates and Sessions Judges, a larger share of responsibility now rests upon the local authorities than formerly. The Court thinks it necessary to bring the fact prominently to the notice of the Sessions Judges and Magistrates of Districts, who are accordingly requested to inform themselves thoroughly from time to time of the mode in which business is transacted by their subordinates. Such inquiry is far more effective than the mere inspection of statements.

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RULES OF THE HIGH COURT.

Rules 3 and 15 of Pleaders' and Mooktears' Rules of 2nd May 1866, as amended.

Notification, dated 7th September 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, the Hon'ble H. V. Bayley, F. B. Kemp, Louis S. Jackson, J. B. Phear, A. G. Macpherson, E. Jackson, F. A. Glover, D. N. Mitter, W. Ainslie, and G. C. Paul, *Judges*.

THE Rules of the 2nd May 1866,* drawn up by the High Court, under Section 4, Act XX of 1865, for the qualification, admission, and enrolment of Pleaders and Mookhtears, and published in the *Calcutta Gazette* of the dates specified on the margin, are hereby amended to the extent indicated below:

Originally in *Calcutta Gazette* of 4th July 1866.
Republished in *Calcutta Gazette* of 10th and 24th November 1869.
And again (with modification, in *Calcutta Gazette* 15th, 22nd and 29th December 1869).

* 5 W. R. (Rules of Practice), p. 9.

Rules 3 and 15 of the Rules are hereby cancelled, and the following Rules substituted therefor (to be read and regarded as Rules 3 and 15):

3. Those of the lower grade shall be competent to appear, plead, and act in the Courts of Moonsiffs and in Small Cause Courts, and in the Courts of Officers in the District of Cachar and the Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Moonsiffs under the Bengal Civil Courts Act, 1871.

15. Any person who shall pass the examination as a pleader of the higher grade, or who shall have obtained the degree of Bachelor in Law of one of the Universities of Calcutta, Madras or Bombay, or of Licentiate in Law of one of the said Universities, and who shall desire to be admitted, shall pay into the Government Treasury of the District in which he shall intend to practise Rs. 20 and shall, on presentation of the certificate of the examiners, or of his diploma and the Collector's receipt for the said sum of Rs. 20, be entitled to apply to the High Court for admission and enrolment.

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 17th June 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Limitation — Tenants in common — Separate collections.

*On Appeal from the High Court at Calcutta.**

Ranee Khujooroonissa

versus

Syud Ahmed Rezah;

and

Syud Ahmed Rezah

versus

Ranee Khujooroonissa.

Two owners of an estate in which they had equal shares, having agreed to collect the rents through a collector appointed by the Court, appeared both of them to have collected and received sums in the mofussil from the local agent of the collector and sometimes from the tenants. The circumstances all went to show that their receipts were not receipts which could be alleged to be receipts by a tenant in common antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, the separate collections of each party having to be dealt with as if received from the agent or collector.

Held that the statute of limitation could not apply to a claim by one of the owners against the other as for the collections made during 12 years previous to the institution of the suit, one party having received more one year and less the previous year; and that it would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date.

It does not follow that because a man who was tenant in common has received something and has then sold it to another tenant in common, that a third tenant in common can make the purchaser answerable personally for that which was received by the person who has relinquished in his favour.

* On appeal from the judgment of Trevor and Macpherson, J. J., passed on the 25th May 1864, in Regular Appeals Nos. 1 to 8 of 1863;—see the Gap Number of the Weekly Reporter, *Civil Rulings*, page 235.

These are appeals from two judgments of the High Court of Judicature of Calcutta, in two suits which were instituted in the Zillah Court of Purneah. They may be described as a suit and a cross-suit respectively, by the owner of a joint estate against the other owner or owners of the estate. The High Court dismissed both suits as having been misconceived, their reasons being shortly stated in the judgment before us. One suit was instituted covering a period of twelve years, and treating anything anterior to that as barred by the Statute of Limitation. The other was a suit that sought, by way of cross account, to take the account from a period long anterior to the commencement of the twelve years. The Court in its judgment says—"The first Court was of opinion that "the Statute of Limitations did apply to a "portion of the claim of Ahmed Rezah, and "that the Court could not enter into trans-"action or revive accounts relating to a period "of more than twelve years before the institu-"tion of the present suit, and that as the "suit was instituted in April 1857, the ac-"counts to be settled by the Court would "be those subsequent to 1845, and those "only. After examining the accounts, the "Judge dismissed the claim of Mahomed "Rezah and passed a decree in favor of "Enaet Hossein, whose whole claim was subse-"quent to 1845, for rupees 34,630-2-10½ pie, "with interest of twelve per cent., and costs "in proportion. From these decisions two "appeals have been preferred to this Court, "and the first point to which our attention "was called was the applicability or other-"wise of the Statute of Limitations to any "portion of the claim of Rajah Ahmed Rezah. "There can be no doubt that mutual accounts, "if they contain some item, or even any one "claim within twelve years, would not be "barred by the Statute of Limitations, though "the rest of the claim were beyond that "term. But this rule is strictly confined "to accounts between two parties which "show a reciprocity of dealings, or, in other "words, to transactions in which there is a "mutual credit founded on a subsisting debt "on the other side, or an express or an im-"plied agreement for a set-off of mutual "debts. Is, then, the present claim of Syud "Ahmed Rezah, as against Enaet Hossein, "a claim of this nature? The parties are

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"8-annas proprietors of the same estate. "They have held their shares separate. They "have by tacit, if not by express, agreement "collected their yearly shares of the rents "by their separate endeavours; and, in short, "by their acts have taken up a position al-"together unconnected with and antago-"nistic to each other. This mode of ac-"tion, no doubt, gives the party who has "received less than half the yearly net rents "of the estate, an action against the party "who has collected more than his rightful "share of those rents; but his right to these "surplus rents arises in consequence of a "wrongful act of the other party, and at the "end of each year a wrongful act of this "nature is a cause of action from the com-"mencement of the year following that in "which the surplus collection was made. It "follows that these yearly claims are in the "nature of separate and distinct demands, "against which the Statute of Limitations "runs, and that they can by no process of "reasoning be brought within those special "and particular accounts as against which "limitation will not run. Turning, then, to "the remarks which have been addressed to us "by the learned Counsel on the part of both "the plaintiffs, and to the accounts filed, and "the case made by each of them against the "other, they appear to us that they are found-"ed on a mistaken view of the case as be-"tween the parties before us. The conten-"tion before us has been that each party "as against the other is entitled to one-half "of the actual collections made; but in our "view this is not the case. Considering the "independent and antagonistic position which "each party has taken up against the other, "and the tacit, if not express, agreement "entered into between them as to the mode "of collection, it seems clear that neither "party has a claim against the other on ac-"count of superior diligence exercised by "him in the collection of the yearly rents, but "that the only ground on which a right of "action accrues to either party is the re-"alization by the other side of a sum larger "in extent that one-half of the yearly rents, "that is, of a sum beyond that to which he "is of right entitled. That such has been "the case—that Mahomed Rezah and Enaet "Hossein have, during any of the years "covered by these suits, collected a sum "beyond their legal right, that is, one-half "of the net rental of the estate, has not been "attempted to be shown to us; but the learn-"ed Counsel have only entered into elaborate "calculations, founded upon very infirm data, "of collections actually made, and have "thereupon asserted the right of their re-"spective clients to one-half of the net actual "collections. Such a view of the case, as "we have above observed, is altogether in-"admissible."

Proceeding upon that footing they find that neither has received more than his half, and they proceed to dismiss both suits. Now in this view of the case, as stated by the Court, their Lordships are unable to concur. Their Lordships are not satisfied either upon the case as stated by the pleadings, or upon the facts as proved in evidence, that the position of the parties was that of parties unconnected with, and antagonistic to, each other—each collecting only that which he could by his diligence collect of the rents of the estate.

The material circumstances are these:—The parties having had quarrels with one another had first of all a collector appointed by superior authority. They then, having got rid of the official collector or manager, appointed an agent of their own; they then again were obliged to be placed under the control of the Court, who appointed an official manager. The duty of the agent and the manager was to receive all the rents and to divide them between the parties. Both parties, however, appear to have collected and received sums in the mofussil from the local agent of the collector, and sometimes from the tenants. The whole of the circumstances, however, show to their Lordships that their receipts were not receipts which can be alleged to be receipts by a tenant in common antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, so that the whole was to be treated as a sum received by the agent, or in his behalf, the separate collections of each party having to be dealt with as if received from the agent or collector. That being so, it seems also to their Lordships that it would be impossible to apply the Statute of Limitations to the claim, because if the account was a continuing account—one party having received more one year, and having received less the previous year—it appears to their Lordships impossible to say, "We will cut the "account short at the twelve years, and not "allow your receipts during the twelfth year, "*ante litem*, to go to pay that which was due "to you in the thirteenth year, *ante litem*." It would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date.

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That being so, their Lordships have to consider what really was the decree which the High Court ought to have made upon the appeal in Enaet Hossein's suit, which is the one now substantially before us, because it is stated by the other appellant that if that appeal is decided in his favour, so that nothing is decreed against him, he is not minded to prosecute any claim on his part further.

It resolved itself therefore into this, whether the decree awarding rupees 34,000 and interest to Enaet Hossein was well founded, and whether the appeal ought to have been allowed. The accounts were, in the first instance, referred to Mr. De Courcy. Mr. De Courcy took those accounts. The result was complained of by both parties. Their Lordships have before them the objections which were taken by the respective parties to the accounts of Mr. De Courcy, which objections were really the matters for decision before the Court of first instance. Of course it would be impossible to ask any Court to go and retake an account, which, by reason of its complicated character had been referred to an expert to take between the parties, and therefore it was quite right for the Court not to go through all the items of the account, but to require and obtain from either party the objections which he took to the account as so taken. Both parties thereupon do present their objections to the account. Mr. Simson, the Judge of the Court below, proceeds to deal with these objections; and it is in respect to the mode in which he has dealt with these objections that it appears to their Lordships that they are able to come to a conclusion which will dispose of the appeals to-day. The balance found due is rupees 34,000. There is one item alone of rupees 56,000 to which an objection was taken, which would more than cover that balance, if the objection were well founded and ought to have been allowed by Mr. Simson. That objection arises with respect to rupees 56,000, which, by the admission of both parties, was not received by Ahmed Rezah, the defendant; but was actually received by his half-brother. But that receipt by the half-brother of the rupees 56,000 was treated by Mr. Simson as a receipt by Ahmed; and it has been contended before us that that was rightly so treated, at least that we have not got the materials for saying that it was not rightly so treated, and that we ought, therefore, if we differ from, or doubted the truth of, the conclusion arrived at by Mr. Simson, to send it back again for further investigation. But it appears to their Lordships that the case with regard to the receipt by Ahmed's brother does appear sufficiently before them to enable them now to arrive at a conclusion without referring it back to take any further evidence, or to enter again into the account.

Now, Mr. Simson has treated Meeran—and it has been suggested before us that he has rightly treated him—as being a mere name and a mere sham; as a person who really was receiving for Ahmed, and that his receipts were to be treated as Ahmed's receipts. But it appears that Meeran had really obtained a decree entitling him to a certain portion of this estate, as an ancestral estate. He was a half-brother of Ahmed, and was therefore *primâ facie* entitled to share in the estate. He had obtained that decree, and after obtaining that decree he did receive the amount of collections which have been brought into this account. There is nothing to satisfy their Lordships, and nothing apparently to justify the assumption of Mr. Simson, that he could treat the whole of that as a mere sham and collusion between Ahmed and his half-brother, for the purpose of preventing Ahmed being responsible for these receipts.

But it does not rest merely upon that. It is important to see in what way the plaint itself in the original suit treats Meeran's position. The plaint in the original suit does not treat Meeran as being a mere sham, as being a person who was not entitled to receive the rents, but says that Meeran was a shareholder, and was made a defendant in the first instance as one of the parties to account. The plaint says this: The share of Meeran in the zemindary; was in the possession of Syud Ahmed Rezah, and Syud Ahmed Rezah knowingly, notwithstanding this extent of appropriation by Meeran, has granted Meeran certain mehals under putnee pottah, in the name of Moosah Rezah, his son, in proportion to his share in the malikanah profits, and got a deed relinquishing claim on the zemindary

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executed by Meeran. Hence the responsibility for this money collected by Meeran which appertained to the zemindary devolves upon Ahmed Rezah personally. Whatever Meeran received under the denomination of his own malikanah from the Mostajirs and Malgoozars of the pergunnah, Ahmed Rezah, after he had the deed of relinquishment executed, not having given to Moostajir and Malgoozars credit for such money collected and appointed by Meeran, has realized it over again, proofs as to which are forthcoming. Meeran and Ahmed Rezah are both step-brothers, and the estate of Meeran is included in the said 8 annas in the possession of Ahmed Rezah. Thus, whoever of the partners of that 8 annas appropriates, responsibility thereof devolves upon Ahmed Rezah, the occupant of the entire 8 annas of the zemindary. Still, it is considered expedient to make Meeran *pro formâ* defendant. That is the case which is made there: that is to say, a charge is made as to the receipt, the only ground for it being that there was an actual receipt by Ahmed. "We charge you with "the receipt of money for our use because "Meeran received it." The ground upon which they put it is—"Meeran is your "brother. You are the joint owners of the "one-half which is divided between you. "There has been some deed by which, subse-"quent to the receipt, Meeran has relin-"quished his share in favor of Ahmed for a "valuable consideration. Therefore, we will "treat the receipts in respect of the whole "of that half which was divided between "Meeran and Ahmed as being receipts for "which they are jointly and severally liable." That seems to their Lordships to be the foundation of the claim in respect of the receipts of Meeran. In point of law, it is to their Lordships quite clear that no such claim can be sustained; that it is not because a man who was tenant in common has received something, and has then sold it to another tenant in common, that a third tenant in common can make the purchaser answerable personally for that which was received by the person who has relinquished in his favor. That is the case made; and there is no case whatever made, and no evidence before their Lordships to show, as has been suggested, that Meeran was merely a name and a sham, receiving everything he did receive on behalf of Ahmed.

It appears to their Lordships clear that Ahmed ought not to be made, and could not legally be made, personally responsible for the rupees 56,000 in a suit which, in their Lordships' view, was sustainable only as a suit for adjusting the account between the parties in respect of their respective receipts from the common agent, or which they had intercepted on the way to the agent. That being so, it entirely turns the balance against the plaintiff. The plaintiff did not, therefore, in the Court below, make out the proper proof to his right to any balance at all as due to him, and the suit in the Court below ought to have been dismissed,—their Lordships agreeing in the result with the High Court, although compelled to dissent from their grounds of decision.

The one suit is thus disposed of, and the plaintiff in the other suit is satisfied with things remaining as they are, and does not seek to have any further accounts or to proceed with his appeal. Under the circumstances of the case, and both appeals having come on together, their Lordships do not think it right to give any costs of either appeal.

Their Lordships therefore agree humbly to report to Her Majesty, as their opinion, that both the decrees of the High Court should be affirmed, and that both appeals should be dismissed, each party bearing his own costs therein.

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The 22nd June 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Practice—Decree for possession—Boundary.

*On Appeal from the High Court at Calcutta.**

Baboo Puhlwan Singh and others,

versus

Maharajah Moheshur Buksh Singh;

and

Maharajah Moheshur Buksh Singh,

versus

Megburn Singh and others.

Held that although it is open to parties before the Privy Council to allege that a mistake has been made in point of law which they did not raise in the Court below, they must clearly make it appear before the Privy Council that the mistake was really made by the Judge below, and that the decision is in fact attributable to such mistake.

Where a decree directed that plaintiff should obtain possession of land according to the boundaries given in the plaint and also specified the quantities of land of which he was to obtain possession, and it turned out that those quantities were not strictly accurate, it was held that the decree should be interpreted as if it were a conveyance of land stating the boundaries and then saying that it contains so many acres; and that the plaintiff was entitled to all the land contained within the boundaries stated in the plaint, the mistake in the quantities stated in the decree being merely a false description.

THIS was a suit in the nature of an action of ejectment, brought to recover a considerable quantity of land which was alleged to belong to the plaintiff, on account of its having been gained by accretion to four mouzahs which had been previously his property. Besides certain defences in point of law which have all been abandoned before us, there were two substantial defences in point of fact on the merits which were raised by the defendant. First, he said in substance that the land was not gained gradually by accretion, as alleged by the plaintiff, but was what is called a chuckee, and after stating the facts, as he alleged them to be, he summed up by saying—"In consequence of the route "thus described by the river, the chuckee in "suit stood firm, retaining all the traces of "numbers and boundaries, and continued "without opposition on part of any one in "the occupancy of your petitioners." Then he raised a second defence on the merits, by which he said—"The land in the south and "north of the disputed land is in the pos-"session of your petitioner, hence, were it "even admitted according to the plaintiff's "false plea that the diluvion was by Dhooee, "still considering the land in suit to be a "part and parcel of the land Nos. 447 and "912 in the occupancy of your petitioners, "none but your petitioners, under the pro-"visions of the very law quoted by the "plaintiff, could be entitled to its posses-"sion." Issues were formed on those pleadings. Both parties were allowed to present their issues, and then the Judge, out of the issues presented, formed those which were to be tried. The material issue was this—"Whether the disputed lands have been "gradually washed away and have accreted "on the estate of the plaintiff by obliterat-"tion of its former marks, or whether by the "sudden change of the Ganges they have "accreted with a continuance of the former "marks." This issue a little confuses the matter by bringing in the marks as if they were necessarily conclusive of the question—"Whether the disputed lands have been "gradually washed away, and have accreted "on the estate of the plaintiff;" as if it followed that because the marks were obliterated, therefore the land had gradually accreted. The other alternative is put in the same way—"Whether, by the sudden change of the "Ganges, they have accreted with a continu-"ance of the former marks." Then there are further issues—"Even if gradually wash-"ed away, whether, on the ground of the "same being intermixed up with other lands "in the possession of the defendants on the "south and north of the disputed lands, the "defendants are entitled to the same or "not?"—"Whether the plaintiff, after being "in possession of the disputed lands, has been "ousted by the defendants or not, and whe-"ther any land adjacent to the disputed "land amongst the accreted lands, is still "in the possession of the plaintiff, or whether "the plaintiff was never in possession of the "contested lands?" A great mass of evidence was given. The Judge in the Court below, the Sudder Ameen himself, inspected the ground on several occasions, and most careful enquiries were made on the spot as to

* The appeal in the first case (that by Puhlwan Singh) was from the judgment of Steer and Kemp, J. J., in Regular Appeal No. 194 of 1863, decided on 29th April 1864; see Gap Number of the Weekly Reporter, Civil Rulings, p. 191. The appeal in the second case was from the judgment of Kemp and Seton-Karr, J. J., in Regular Appeal No. 361 of 1865, decided on 17th April 1866;—See 5 W. R, *Civil*, p. 211.

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whether the land had gradually accreted or whether it had been a chuckee suddenly formed. It was then ordered that an Ameen should draw a plan, and survey the land and present a report to the Court. That accordingly was done. He framed the plan in the suit which is before their Lordships, which shows by distinctive colours—yellow, pink, and green—the land sought to be recovered in the action, the chuckee which is admitted still to belong to the defendants, and land which is in the possession of the plaintiffs but is claimed by the defendants.

Now, the questions which really arise are two,—first, whether the land has gradually accreted, and how that issue ought properly to be determined; and secondly, whether the defendants, by reason of their chuckee, are entitled to any portion of the land, even assuming that it has been accreted?

As respects the first question it is necessary to consider, have the Courts below been wrong in point of law, or have they committed any error in fact? Now, no doubt their Lordships at one period of the argument had considerable doubt whether there might not have been a mistake in point of law, because, looking at the nature of the report of the Ameen and of the judgment of the first Judge, and even at the form of the issues, there appeared reason to doubt whether it had not been supposed that if the surface of the land had all been changed, and the marks had all been obliterated, so that no houses or trees or mounds or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river,—that was conclusive of the question. Now, if the Court below had meant to say that was conclusive in point of law, so that the land was to be considered as land gradually accreted, even although the channel of the river had changed and had gone from one bed and course to another; if the Court below had meant to say that, if the marks of the old channel were obliterated, and if the marks of the land between the old channel and the new channel had also been obliterated, by reason of the water having flowed over the surface and washed off the old land, and brought new sand and mud down upon it; notwithstanding there was land left between the two channels which had not, in fact, fallen into the river and been entirely sunk into the channel itself.—if they meant to say that was conclusive, their Lordships would have thought they would clearly have been wrong in point of law. But upon the whole of the case it does not, in fact, appear that the defendants ever substantially raised that question before the Court below at all. In their arguments they appear to have assented to the framing of the issues in the way in which they were framed, and they appear to have assented to resting their case on the question whether the land which is sought to be recovered did or did not on its surface appear to be entirely new and fresh-formed, with no marks of the old cultivation and habitation upon it, or whether it had, as they seem to have alleged it had, houses and trees, and boundaries and marks of the old cultivation upon it. Certainly, when parties before their Lordships allege that a mistake has been made in point of law, if they have not raised that question in the Court below, although it is certainly open to them to raise it here, yet their Lordships ought to be very certain indeed that the Judge really has made the mistake imputed to him, and that the decision in fact is attributable to such mistake. It may well be that the Judges made no such mistake at all, that they perfectly understood what gradual accretion is, and what the true rule of law on that subject is, and that they meant merely to say that, as a matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the defendants had alleged. If any marks of the old channels, or of the old houses, and of the trees, and of the old mounds, could have been found, that would have been conclusive against the plaintiff, and therefore it was a matter very material to be inquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the plaintiff had proved his case, but it does not appear that that objection was ever taken. The parties were content to rest upon the issues as framed, and it may be that they all thought, and possibly thought rightly, that under the circumstances, the condition of the land would be the best evidence which could be given as to whether the land really had gradually accreted, or whether there had been a sudden change in the course of the river. Therefore their Lordships think that it is impossible to say that either of the Courts below came to any wrong conclusion in point of law on the question of accretion.

Did they then make any mistake in point of fact? And certainly, looking at the great extent of the changes, and particularly at the maps, and some portion of the evidence, there might be some reason to doubt whether the whole of it had really accrued by gradual accretion as alleged. But their Lordships are of opinion that the case clearly comes

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within the rule which they have so often laid down, where the dispute turns upon matters of fact and where the Courts below have agreed on the conclusion which they have come to respecting that fact. This was a case where a careful examination on the spot was most material towards coming to a proper conclusion on the fact. That examination was held, and apparently very carefully held, and it was after that examination that the first Court came to a conclusion in favour of the plaintiff on that part of the case. The High Court came to the same conclusion, and their Lordships are of opinion that there is certainly no such errror shown in that conclusion as would enable them, or make it right and proper, to reverse or alter that decision. It may be added that the map of 1851 appears to their Lordships to show that as respects one great change that took place in the course of the river, the effect of it was that the plaintiff got a large acquisition to his mouzahs, and that what he so got, which contains a large part of that coloured green, and probably a small part of that coloured yellow, was gained by gradual accretion. Therefore, on the whole, their Lordships think that they ought to come to the conclusion that the first material issue was properly proved and decided in favour of the plaintiff.

Lopes's case* was very strongly urged upon their Lordships; but their Lordships do not think that this case is at all governed by the decision in Lopes's case. That was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. Here the sole question is,—has the land, by gradual accretion, been accreted to the estate of the plaintiff, the defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then restored? As their Lordships are not convinced that the Courts below have erred in point of law, and as they have taken very careful means to go right, and there is nothing to satisfy their Lordships that they went wrong in point of fact, their Lordships are of opinion that their judgment on that part of the case ought to be confirmed.

But there is a second very material portion of the case, namely, whether the whole of the lands have really accreted on to the plaintiffs' land; and certainly the map itself, to the eyes of everybody who looks at it, appears to show that it is a very extraordinary conclusion that these lands have wholly accreted to the plaintiffs. Here we have on the south the chuckee, admitted to belong still to the defendants; the land on the other side of the river belongs to the defendants: and yet it is supposed that many hundred acres of land in fact directly situated between the defendants' land and the river, and their land on the other side of the river, somehow or other have accreted to somebody else's estate, and not to theirs!

The Judge in the Court below, dealing with this question, deals with it very shortly, and says they cannot claim any portion of disputed land as having accreted or belonging to their land, because the river Ganges flows between them. That is in itself unquestionably an inaccurate statement. The river Ganges does not flow, at least did not flow at the commencement of the suit, or for some time previously, between them. What had happened was this. The river Ganges had originally flowed, as is admitted on all hands, at the bottom of the undisputed chuckee. Then, by what is admitted to have been a sudden change, a portion of the Ganges began to run above the chuckee, and between what is now the chuckee and the disputed land which is coloured yellow. Now it seems quite clear from the description of the premises that the whole of that portion of the stream which so flowed between the chuckee and the land coloured yellow, and in fact much of the land coloured yellow itself, was then the property of the defendants. Therefore, the whole that was there before the Ganges came was the property of the defendants. Well, then the Ganges comes there. It is not necessary, perhaps, to say what exactly the effect of that might have been on the soil covered with water. Their Lordships must not be supposed to say that that was taken away from the defendants. But, at any rate, the moment that the Ganges left that stream which it had so formed—and it certainly does not appear to have remained there above a year or two, as far as their Lordships can discover—the moment that course became a nullah, dry in the dry season, it appears to their Lordships quite clear (and indeed Lopes's case would be for that a direct authority) that that land which had been covered with water, when it ceased to be covered with water, became the property of the defendants. The consequence is, that the defendants were themselves the owners of the land to which the greater part of the

* 14 W. R., P. C., p. 11.

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new land accreted. It appears to their Lordships quite clear that that portion of the yellow which is *ex adverso* the chuckee must be taken as accreted to the chuckee.

As to the other portion, their Lordships think that the plaintiffs have shown that the land coloured green was in their possession, and that that portion which is *ex adverso* the land coloured green, has accreted to that land. The High Court on this part of the case took a view which certainly appears rather surprising, that because the defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused by gradual accretion; that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue, and is also stated in the judgment of the first Judge in the Court below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage. The carefully prepared map of the Ameen shows with sufficient accuracy how this division is to be made. Their Lordships think that taking the point where the extreme left of the yellow at the bottom of the nullah intersects with the land coloured white in the map directly below the green, a line must be drawn from that point, as nearly as may be perpendicular to the course of the Ganges, until it meets the river, and that the land which lies to the right of that, that is to say, to the south-east of it, will belong to the defendants, and that the land which lies to the north-west of it will be the only land which the plaintiff is entitled to recover in this suit.

With reference to the second suit, their Lordships think that the point on which the High Court decided that suit does not arise, because they say that the plaintiff has not recovered the whole of the lands which he might have recovered in the first suit. Now they arrived at that conclusion from this consideration: the plaintiff, in his plaint in the first suit, specified the boundaries of the lands which he sought to recover, and he most clearly specified the boundaries towards the Ganges as being the river Ganges itself; and there can be no doubt that he sought to recover the whole of the land which he said he was entitled to up to the Ganges, but he stated also the number of beegahs that there were in his plaint, according to his measurement, as 2,967. When the Ameen of the Court came to measure it, he found that there were more beegahs than the plaintiff had estimated, and therefore the High Court came to the conclusion that he had only recovered the 2,967 beegahs. They did not alter the judgment of the lower Court at all, but simply affirmed the judgment with costs. The High Court then comes to the conclusion that, having recovered only that quantity, he had failed to recover the excess, which is therefore not his, and that the subsequent accretion is to that excess. It is not easy to see, if he was not to recover the whole of the land between the boundaries which he had stated in his plaint, what portion of the land stated within those boundaries he was not to recover; and it is not very easy to see why that portion has been taken from the land next the river rather than from any other portion. But their Lordships are of opinion that that is really a misconception of the true legal effect of the decree of the Court below. That decree is this:—"That a decree be given to the plaintiff, that the "plaintiff obtain possession of 2,967 beegahs "10 cottahs of disputed land mentioned in "the plaint, and in the map of the Court "Ameen, according to the boundaries given "in the plaint." Well, now, the judgment is that he is to recover it according to the boundaries given in the plaint. It is true, it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is, which is he to recover, the quantities or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to this case, because they find among the rules which prevail in the Courts in India, it is stated:—"Where the "boundaries of the property in suit are "required by the Code to be specified, they "ought to be stated with as much precision "as possible, a map being, if necessary, annexed to the plaint, or some map which has "the character of a public document being referred to; but if the boundaries be set forth, "the land may be decreed to the plaintiff, "even though the quantity be somewhat more

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"than they stated in the plaint." Now, that is the very thing that happened here. The quantity was somewhat more than they stated in the plaint; but their Lordships think that the true construction of the decree in the first suit was, that it was a judgment for all the land contained within the boundaries stated in the plaint. That being so, the ground on which the Supreme Court relied in the second suit, namely, that there was a splitting of the suit, did not arise at all, because he has recovered in the first suit all the land which he could recover. In the result as arrived at by their Lordships, he has not in fact recovered anything like what he has claimed. At any rate that point does not arise, because it was not correct to say that it was not necessary to bring a second suit. There was a continual fresh accretion going on during the two years which elapsed between the time when the first suit was commenced and when the second was brought. It appears to their Lordships that the second suit is substantially brought for that newly accreted land, and the decision in the second suit ought simply to follow the decision of the first. To avoid any possible misconception, their Lordships have had the line drawn on one of the copies of the Ameen's map which is to be annexed to their report, and so much of the land claimed in the second suit as lies to the north-west of the line which has been already specified, their Lordships think the plaintiff is entitled to recover in the second suit.

There will, of course, be some further question about the mesne profits; and it appears that the cases must go back to the Court below for the purpose, first of all, of fixing the boundaries as described in the line which has been specified; and next, of finding out what are the real mesne profits according to these boundaries. There is no information before their Lordships by which it is possible that they could specify what those mesne profits should be.

As to the costs, their Lordships are of opinion that, as respects the costs in the first Court, they should be given according to what is the ordinary practice of the Courts in India as to giving costs in cases where a plaintiff recovers a portion only of the land which he claims, and there is a successful defence as respects the other portion. Their Lordships are further of opinion that, under all the circumstances, there should be no costs at all to either party, either of the appeals to the High Court or of the appeals that have been brought to the Queen.

Their Lordships will, therefore, recommend to Her Majesty that an order be drawn up in accordance with these terms.

Their Lordships' recommendation to Her Majesty on these appeals will be that she would allow both appeals, and declare that the plaintiff in the suits (the Maharajah) is entitled to so much of the accreted land as lies on the north-west of the line drawn on the map annexed to this report, and that the defendants are entitled to so much of the accreted land as lies on the south-east of that line; and that she should remit the causes to the High Court, with a direction to put the parties in possession, and to settle the amount of wasilat payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the Zillah Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either appeal.

The 23rd June 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish and Sir Lawrence Peel.

Finding of fact—Fabricated documents.

*On Appeal from the High Court at Calcutta.**

Ranee Surrut Soonduree Dabea

versus

Kooer Poreshnarain Roy.

Judgments of the Lower Courts,—holding that two documents set up by the defendants under which they claimed to hold as jotedars were fabrications,—upheld.

THIS suit was brought by the respondent Poreshnarain Roy against Bhyrubnath Sandyal to impeach as a false and invalid jote the tenure of certain lands which were held by Bhyrubnath Sandyal under several leases, granting perpetual leases at a fixed jumma.

* From the judgment of Steer and L. S. Jackson, J. J., in Regular Appeal No. 577 of 1862, decided on 24th December 1863,—not reported.

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The original leases are said to have been granted by one Ranee Soorjomonee. The history of the plaintiff's family is shortly this. The zemindary, in the year 1798, belonged to one Rajah Rajendronarain. He died without issue, leaving as his heiress his widow, Ranee Soorjomonee; but he also left an onoomottee-puttro or direction to adopt, under which, in the year 1813, she adopted a person of the name of Bhoopendronarain. Bhoopendronarain died in the year 1845, and he left three sons, of whom the plaintiff in the action was one. The two other sons died, and their shares vested in their mothers, the widows of Bhoopendronarain. It is not necessary to consider their interests, because the final decree gave to the plaintiff in the suit only that one-third of the property to which he would have been entitled, if a co-sharer with his two deceased brothers. Therefore, for the purposes of this appeal, it may be considered as if the litigation were between the plaintiff in the suit as zemindar, and the jotedar—who was represented by the defendants.

It is admitted that this title commenced, if it commenced at all, by grants of these tenures from Ranee Soorjomonee, and that the date of the earliest of those grants was posterior to the date of the adoption. It follows, therefore, that at the time when she made that grant she was no longer heiress in the possession of the estate, whatever her rights as a Hindoo female and heiress might have been previously, but that the whole interest in the estate had vested in the adopted son. Bhoopendronarain appears to have come of age some time about the year 1840. He brought a suit to recover the estate from his adopted mother, and a decree was made in his favour in July 1844. He sought to execute that decree; and after he had sued out execution, a compromise took place between them. Disputes afterwards again arose between them, and he renewed his application for execution; and it is clear, upon that proceeding in which the rights of the Court of Wards with the widow were afterwards discussed, that, when he died, that second application for execution was then pending, and that no writ of execution had in fact issued from the Court. In the Court below, the principal issue was as to the validity of the jote, which of course involved the question whether the jote had ever been created by the leases and grants of the Ranee, and if they had been so granted, whether those leases were valid as against the plaintiff and if not valid as against the plaintiff whether they had been confirmed by his father Bhoopendronarain, in which case, of course, he would be bound by them. The Principal Sudder Ameen seems to have held that the leases were not proved, but it will be, perhaps, the simplest and most favorable way to the appellants to assume that those leases were really granted by the Ranee. It is, however, admitted that if not afterwards confirmed by Bhoopendronarain, they would not be binding on the plaintiff in this suit. If it were necessary for us to decide the question of the original grant of the leases, a good deal might turn on the fact of possession, because it is perfectly clear that those parties were found in possession as ijaradars on the death of Bhoopendronarain, when the estate passed into the custody of the Court of Wards, and that they were, for a considerable number of years, in possession under it.

As the real turning-point of the case is this question of confirmation by Bhoopendronarain, it is necessary to consider what the case made by the appellants in that respect is. Their title rests entirely upon two documents at 166, and the evidence which they have given in support of those documents. Now the first of those documents has been sometimes spoken of as a dakhilla, but it seems really to be what Mr. Field described it, not a mere ordinary dakhilla, or receipt, by a collector of rent, but a statement by Bhoopendronarain that 300 rupees had been paid as rent. It is in the form of a letter to the then jotedar, importing that the writer had received that rent, and that the jotedar would receive in the ordinary way, at Pootia, the ordinary dakhilla. Still it no doubt implies that this money had been paid as rent to and received by the Rajah in person, and that, not at Pootia, but at Rampoora to which he is said to have gone, and the date of the document is the 10th Assin, fifteen days before the Rajah died at Pootia. The other document is in the nature of a proclamation, addressed to the gomashta, Munduls, ryots, etc, of all lands comprised in the jote, and it assumes that there was an attachment affecting that property, and directed the attachment to be removed, and that the ryots upon those lands should be allowed to pay their rents to the jotedars. It is upon these two documents that the title of the defendants in the action depended.

It is no doubt true that these documents which are now impeached did exist immediately after the death of Bhoopendronarain, because they are referred to in the proceeding of the Court of Wards, which is at page 171. The proceeding is addressed to the tenants of the jote, and after stating that not only the documents which purported to be original

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leases from the Ranee, but those granted under the signature or seal of Bhoopendronarain Roy in the year 1252 had been brought into the office, it says—" you will, until you receive a " second order from the Court of Wards, pay " the rents to the said permanent jotedar, and " ijardar, and will take receipts thereof." But still, even supposing that the Court of Wards had the power, which their Lordships are not prepared to say they had, of binding the respondent, then an infant, by a recognition of this jote, that proceeding is not more than an *ad interim* recognition of the title because it makes the direction to pay the rents subject to any second order of the Court of Wards. Therefore there seems to be no ground for contending that the defendants were relieved by that order, or by the subsequent possession and enjoyment by the jotedars, which certainly continued so long as the Court of Wards was in possession of the estate, from giving that proof against the plaintiff in this suit, which otherwise they would be bound to give. Their case is this, that these documents were executed by the Rajah at Rampoora, that they were executed in pursuance of some arrangement, the particulars of which are nowhere very clearly stated, which had previously taken place at Pootia, and that they were executed within fifteen days of his death. On the other side, it is said that the Rajah did not go to Rampoora, that he was incapable of going there, that he was in the last stage of consumption, that he died fifteen days after this document is said to have been executed at Pootia, and therefore that the documents are fabrications.

It is impossible to conceive a case which more completely turns on a pure issue of fact. Both the Courts below have decided that there is a failure of proof and that the documents are not genuine; and their Lordships are bound to see not merely that there is a mere balance of testimony, but that there is so strong a preponderance of testimony against that finding that they can confidently pronounce it to be wrong. They are unable to do so. They think that the observations of the Court as to the improbability of such a transaction taking place with the Rajah and at the place at which it is said to have taken place, are extremely cogent. The circumstances in which the estate is said to have been at that time, in order to account for the form of the documents, which purport to take off an attachment, are not made out. So far as their Lordships can see, no attachment had thus issued by way of execution in the suit between the Rajah and his mother. A suggestion has been made of some other possible attachment, but there is really no evidence of any such proceeding. The testimony of the last two witnesses read by Mr. Bell points to an attachment, in the nature of an execution of that decree, which the Rajah had obtained against the Ranee.

Their Lordships, therefore, are unable to see that the Courts have in any way miscarried in coming to the conclusion to which they have come, and, adhering to their rules, they must humbly advise Her Majesty to dismiss this appeal with costs.

The 27th June 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Surety — Government bonds — Evidence.

On Appeal from the late Sudder Court at Agra.

Lalla Bunseedhur,

versus

The Government of Bengal.

In a case in which a surety was sued by Government for the amount of defalcations committed by the person for whom he was security during the period of 6 years out of a total period of 8 years for which he held office, it appeared that the surety bond was renewed only three times,—the old bond being retained by Government, —and that in the other years the Government did not renew the bonds but made an enquiry into the sufficiency of the security. It was contended by the surety that by the renewal of the bond, each bond as it was renewed was in fact a novation, so that no action could any longer be maintained upon the old bond, and the surety was only responsible for the deficiencies which might have taken place subsequently to the giving of the last bond.

Held that in the absence of any thing to show that the Government knew of the frauds or that the surety had any idea that he was discharged or had a right to the old bonds, it could not, in this case, be inferred that it was intended to discharge the old bonds, if after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence.

The *ex-parte* deposition of a witness who might have been called and cross-examined at the trial ought not to have any weight given to it.

This was an action brought on the part of the Government of Bengal against Lalla Bunseedhur, who was a surety for the Treasurer of the Mirzapore Collectorate; and it was brought to recover a sum with interest of upwards of 60,000 rupees. The case on the part of the Government was that between 1843 and 1848 the Treasurer had been a

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party to the embezzlement of the sums of money in question. Now, the first defence that was relied upon was a defence in point of law. It appears that the surety bonds were three times renewed. The Treasurer occupied that position for a period of eight years. The bonds were not renewed every year,—they were three times renewed, and in the other years the Government did not renew the bonds, but they made an inquiry into the sufficiency of the security. The first point that was argued on the part of the appellant was, that by the renewal of the bonds each bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old bond, but it must be taken that by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time; and that though they did not give up the old bond, yet, practically, the new bond was to be taken in lieu and satisfaction of the old bond; so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new bond. If that defence was correct, the consequence would be that there would be a defence to all except any deficiencies which might be proved subsequently to the giving of the last bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new bond was given in substitution for the old one. The Sudder Court says that in their judgment the new bond was given probably under a misapprehension of what was the proper construction of the orders of Government, which require that from time to time—in fact, annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable, that new bonds should be given; but, however that may be, the question simply is—are we to infer that it was intended to discharge the old bond, if, after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence? If, indeed, the Government had known of the frauds, that would raise a totally different question, for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old bonds were never given up. The surety did not ask for the old bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old bonds, and their Lordships think that the explanation given by the High Court is the correct one; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the bonds. Then it was argued that at any rate the Government having satisfied themselves, by their Collector, and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is that if secret embezzlements take place, the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the judgment of the Zillah Judge. He puts it in this way:—"The Government asserts that the "embezzlement occurred in this way, *viz.*,— "the Treasurer received sums of money on "account, revenue of villages, &c., which he "did not pay into the Government Treasury, "or enter in his Hindee Siaha; but, in con-"nivance with the Siaha Navees and others, "entered in the Persian Siaha as received by "transfer, although there were no deposits "on account of the said villages, &c., from "which payments by transfer could be made, "at the same time referring in the said Siaha, "and also in the receipts he gave for the said "sums to orders issued for payment by trans-"fer from *bonâ fide* deposits relating to other "villages, &c., which payments again were "made up from moneys paid into the Govern-"ment Treasury in advance on account of "other villages, &c., which will be adverted to "below. Bunseedhur, in his answer, does not "positively deny that the sum sued for "has not been embezzled, but he insists that "Sreekishen never received the items "forming that sum, or they would be in his "Hindee Siaha; and, moreover, frauds have

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"not been adduced to show that the sums "were sent to him to take charge of; and "that, in short, the Persian Amlah and Teh-"seeldars are the embezzlers, and not Sree-"kishen. I consider that the statement of "the Government proved as to the amount "embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the appellant that it was proved only by inadmissible evidence; and, indeed, it is on account of this allegation that the charge was only supported by inadmissible evidence, that their Lordships have been induced to hear this case at such considerable length as they have done, because, if it had been simply an ordinary case in which it was a pure question of fact, which both the Courts below had agreed on, it would have been governed by the ordinary rule, that unless it could be clearly shown that the Court below had made some plain mistake the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of England, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this: when the alleged frauds were in the first instance discovered, the first thing which was done was that the Collector went down to examine into the matter; and to examine every body who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither Sreekishen nor Bunseedhur were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them except Sreekishen himself were dead), they ought to have been called at the trial; and to rely upon an *ex-parte* deposition of a witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to. But as respects Sreekishen himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (into the details of which it is unnecessary to go at present,) he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected,—it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably the examinations (at any rate the examinations before the Collector) might be referred to for this purpose at least, namely, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the Zillah Court and of the Sudder Court (certainly of the Sudder Court), and their Lordships are disposed to think of the Zillah Court also, that any reliance was placed upon them, and therefore they may be rejected. The real question is, therefore, first of all taking the evidence which must be and every-body says is admissible, how does the matter stand? There are three things to be made out, that there was an embezzlement, that the sum embezzled amounted to the sum claimed, and that Sreekishen, the treasurer, had a guilty knowledge of, and was a party to, those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Court below. It is charged plainly in the plaint,— the answer does not in plain terms state that there was no embezzlement at all. On the contrary, in the very first answer, the substantial defence is that if there was an embezzlement, Sreekishen was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the bill of discovery having been filed previously, were open to examination on the part of the defendant.

Then the Accountants were called, and they stated what the result of all the documents was; they stated that they did show a deficiency in the accounts to the amount claimed,—that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of the

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voluminous accounts. In this country it is the practice to call an accountant, who goes through the books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive banker, and they appear to have been clerks of his own who themselves went through these accounts, and after they went through them, they were asked did they want any more documents,—was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement in these accounts to the amount stated. But they rest their defence upon this: they say these accounts do not make out that Sreekishen, the treasurer, was a party to the embezzlement. The result come to from an examination of the accounts, as they allege, is that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the treasurer had been a party to it.

The question, therefore, in their Lordships' opinion is reduced to this—is there satisfactory evidence that Sreekishen, the treasurer, was a party to these embezzlements? and that also in a great measure resolves itself into this—is there satisfactory evidence that these sums in question were received in cash at the treasury at all? for if they were received in cash, then, according to the ordinary course of business, they were handed over to the treasurer himself; and inasmuch as the Persian clerks never handled the money, it is impossible to see, if the money really was brought into the treasury, how, by any manipulation of the accounts, the Persian clerks, who had not got the money, could possibly carry out these frauds or embezzle the Government money without the knowledge and assistance of the treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this: the payments were either made in money or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the treasurer. The practice was that it was carried into the room where the treasurer was, and it is stated by some witness that somebody else was always there with him, and there the money was paid over. There was a receipt, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the treasurer to see that that amount of money is entered in the Hindee account. Then it is also taken to the Persian clerks, and they have to enter the receipt of the money in the Persian books, and then the receipt has also to be taken to some other clerk, who enters it in the dakhilla account-book, and then the receipt (whether before or afterwards does not clearly appear) is signed by the treasurer, and that it is given to the person who brought the money. Then it would appear that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the treasury itself, having been previously paid in cash, or they may be in some other treasury, as at Benares, where it may be more convenient to the landowner to make his payment. If that is the case, an order always has to be got from the Collector to authorize that transfer by way of deposit, and then that order appears to be brought to the office, and upon the authority of that order the transfer is made. Now there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class; that is, where the receipts were actually given. Now, in these cases, the forms of the receipts are set out at page 696; and the first and the strongest evidence against the treasurer is this: that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, purport to be a receipt for money. There is a number, and in the first column there is the name of the mehal, and in the second column there is the name of the malgoozar on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the date upon which the money was deposited, which perfectly plainly means the date of the payment, which is the 30th of March 1844 upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also perfectly

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plainly means the name of the person who brought the money to the treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th of March 1844, being the same date as that upon which the amount was paid.

Now this is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the treasurer himself, with a memorandum "rupees 743. Received by transfer by a "Perwannah, No. 2669," in the particular one to which we are referring.

Now, there is perhaps some little difficulty, or, at least, their Lordships had some difficulty in the course of the argument, in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the treasury by deposit, whether it was the treasury at Mirzapore or the treasury at Benares, no doubt some receipt, acknowledging that payment, must have been given. Several of the witnesses who were examined upon the part of the Government stated that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the Sudder Court which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other, whether the practice was first introduced by this particular treasurer or whether it was introduced before, is not perfectly clear; but, at any rate, upon many occasions a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at all at the time when it was given. Therefore the receipt forms the first evidence and very strong evidence against the treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the Canoongoes, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash. That, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindee Siaha, which would make it clear, and which in fact is not seriously denied, that if it was paid in cash, beyond all question the treasurer was a party to the embezzlement. Then in the Persian Siaha they are entered upon the day upon which the payment was made, and it is very important to observe that they are entered as paid in cash. In examining the items it is quite plain that in the body of the Siaha they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings as having been paid in cash, then the amount of cash in the Persian Siaha would have differed from that in the Hindee Siaha, and then when the Collector came to examine the books the fraud would have been discovered directly. Therefore, though they are stated in the body of the Persian Siaha as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find in these Persian Siahas that day by day not only is the ultimate balance signed by the treasurer, but the pages are also signed. It is said that he does not understand the Persian language, but there is no satisfactory evidence of this, and it is very improbable that the Persian clerks should have dared to go on day by day making those false entries which the treasurer could have discovered at any time.

Then, besides that, there was another clerk, who kept a book of receipts called the dakhilla account, in which nothing was entered except payments in cash, and in which we find these entries as being received in cash. Now, taking all that evidence of the payments being received in cash, are we to believe that the landowner or his agent who brought the money, the village authorities, the Persian clerks, the persons who kept the dakhilla books (of whose guilt there is no evidence whatever) were all combined to cheat the treasurer, and that they should succeed during this long period of years in cheating the treasurer, though at the very time they cheated him they brought these documents day by day to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindee Siaha, or the Persian Siaha, or in the dakhilla book. The only

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place in which you find any reference to them is in the receipts themselves in the handwriting of the treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the accountants of the defendant, that in reality these transfers were all false and fictitious, because in reality they were not transfers from the accounts of the landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to inquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. Forsyth has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that, nor is it necessary to consider in detail whether there is sufficient evidence in those cases in which the entries are not produced, but only the copies of the receipts. Their Lordships must consider them as copies of the receipts, nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that there were frauds to this amount and how they were concocted and carried out, and when it is further shown clearly from certain instances that there is evidence, beyond all question, that the treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

The 28th June 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Evidence—Forgery.

*On appeal from the High Court at Calcutta.**

Kurallee Persaud Misr,

versus

Anuntoram Hajra and others.

Judgment of the High Court, reversing a decision of the lower Court which held a deed to be a forgery, upheld on a consideration of the evidence in the case.

THE appellant in this case brought his suit for the cancellation of a deed of sale alleged to have been fabricated, and for certain leases granted under the title acquired by means of that deed of sale, and for setting aside an order made in an Act IV case.

The short outline of the case is this:—The respondent's family were the owners of a putnee talook; that talook was sold for arrears of rent in 1850; it was then purchased in moieties, one moiety being purchased by the father of the appellant, the other by a person of the name of Lukhikant. Whether Lukhikant purchased benamee for the dispossessed putneedars, it is immaterial here to consider, because it is clear that in December 1858 the title of Lukhikant, whether a mere nominal title or a beneficial ownership, was transferred to and became vested in the respondents. Between December 1858 and the date of this alleged transaction in March 1859, Muddosoodun and the respondents were the joint owners of the putnee talook; that is now an admitted fact. It is then alleged, on the part of the respondents, that on the 15th March 1859 they purchased Muddosoodun's share from him. The deed produced and impeached bears that date. That deed was registered on the 6th April 1859. On the 15th April 1859, the respondents granted the earliest of the leases impeached to certain native coal-masters, and on the 23rd April 1859, Muddosoodun, professing to be still owner of a moiety of the talook, granted a lease to a rival coal company, known as the Bengal Coal Company. From that time the

* From the judgment of Bayley and E. Jackson, J. J., in Regular Appeal No. 420 of 1861, decided on 17th August 1864,—not reported.

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parties seem to have been *in flagrante bello*, backed on either side by their respective lessees, the rival coal workers. The active dispute is said, and appears on the face of the Magistrate's proceedings, to have begun as early as the 25th April 1859. It led to proceedings under Act IV of 1840, the final proceeding in which was had before the Magistrate in July 1859. He then made an award declaring that the respondents were in possession, under a deed of sale, of the moiety of Muddosoodun, and that award was upon appeal affirmed by the Judge on the 20th December 1859. Intermediately there took place those high-handed and lawless proceedings on the part of the Bengal Coal Company in the interest of Muddosoodun, and in their own interest as the lessees from Muddosoodun, to which our attention has been directed by Mr. Bell. Muddosoodun died in May 1860, and the suit was brought by the present appellant, his son and representative, in 1861.

The Principal Sudder Ameen decided in favour of the plaintiff on the 9th September 1861, and upon appeal that decree was reversed by the High Court, which, on an application to review its decision, pronounced a second decree adhering to the first. Against those two decrees the appeal has been brought.

Now it is obvious that the one single issue, upon which the whole case depends is, was this deed forged, or not forged? If the parties claiming under the deed were trying to defeat an existing possession on the other side, and to recover by virtue of the title derived under the deed, their Lordships are not prepared to say that there are not circumstances of suspicion attaching to the transaction which might make it doubtful whether plaintiffs so suing had discharged the burden of proof which lay upon them. But that is not the nature of the suit. The parties claiming under the deed are in possession. They have been found to be in lawful possession by the Magistrate's award confirmed by the Judge. These are decisions of competent Courts that the respondents were in fact in possession, and that their possession was acquired lawfully and under colour of the deed; and it is impossible wholly to disregard that finding, though, no doubt, the propriety of it is one of the matters in issue in this suit.

That being the case, we proceed to consider, in the first place, what is the evidence on which the appellant calls upon their Lordships to reverse the decisions under appeal and to declare this deed a forgery.

The greater part of the evidence adduced by the appellant is really of the most worthless character. It is the mere rumour existing in the locality as deposed to by ryots and others, persons who do not profess for the most part to speak from their own knowledge. On the other hand, there is an absence of that kind of evidence which in such a case one would have expected to see. What the case of the respondents as to the execution of this deed was must have been made known to the appellant by the proceedings in the Act IV case. That case is that the deed was executed in the house of Muddosoodun; that the consideration money was brought there; that it was paid there, and the date of the transactions is fixed by the date of the deed. Yet not a single witness is brought from the family of Muddosoodun either to impeach his handwriting, or to prove that this story was a mere figment, and that the parties were not there at that time, and that no such transaction as deposed to took place. It may be true that this kind of evidence is very often given by witnesses who do not receive much credit; but in every case it must depend on the character of the particular witnesses whether such evidence is credible or not, and the absence of any attempt to prove such a case is a circumstance which is certainly open to much observation.

Such strength as there is in the case of the appellant is to be found in the judgment of the Principal Sudder Ameen The following are the principal grounds on which he decided in the appellant's favour. He relied upon the fact that the deed, therefore, instead of being executed on a paper bearing one stamp purchased immediately before the date of the deed and purchased by the persons who propounded the deed, or purchased (according to what is said to be the ordinary course) by Muddosoodun, the vendor, has been engrossed upon two stamped papers purchased by different persons, and at different dates within a month of the execution of the deed. He also relied upon the circumstances attending the registration of the deed, as to which we shall presently say a few words. Again, although there was no evidence as to the handwriting before him, he upon his own comparison of the handwriting came to the conclusion that the name of Muddosoodun, when compared with an admitted signature of that person, did not appear to be in his handwriting, and that it resembled the handwriting of the person who wrote the body of the deed. He further in some degree relied upon the witnesses upon whose testimony

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their Lordships have already remarked, who stated from hearsay that no sale was ever made by Muddosoodun, and upon some evidence given to show that the respondents were persons who were not rich enough to purchase the talook; and, on the whole, he came to the conclusion that the forgery had been made out.

Their Lordships entirely concur with the judgment of the High Court that the stamped papers under all the circumstances of the case do not raise any strong argument against the validity of the deed.

Upon the question of handwriting they have to deal with this circumstance. There was no evidence given in the cause that the signature of Muddosoodun was not in his own handwriting; and against the opinion of the Zillah Judge, founded on a comparison of handwriting, they have to set the opinion of the two Judges of the High Court, who, in the first instance, decided the appeal, supported as it was by the opinion of three of their brethren to whom they submitted that point, one of whom was a native presumably as competent as the Principal Sudder Ameen, to determine a question of Bengali handwriting. The circumstances attending the registration are no doubt those which most strongly tend to cast suspicion upon the transaction, but their Lordships are not prepared to say that in a case in which it lay upon the other party to prove the forgery, they amount to proof of a forgery. It seems to their Lordships that the mooktear, who is missing and is not called by either party, might as well have been called by the one party as by the other, if he had been forthcoming. The mooktearnamah itself is not before them, and upon that part of the case all that can be said is that it is left extremely bare; and that as it lay upon the plaintiff, the appellant, to make out his case, any mere deficiency in the proof must fall upon him, and not upon the other side. Whatever be the value of the testimony as to the inability of the respondents, and it does not appear to their Lordships to be very great, it is obvious that any deficiency in their means of making the purchase, if it existed, would probably be supplied by the opulent persons who wished to obtain a lease from them for the purpose of working the coal.

With respect to the question of possession, which the Principal Sudder Ameen seems also to have considered was wrongly found by the Magistrate in favour of the respondents, their Lordships are of opinion that there is nothing before them which would warrant their saying that that finding, supported as it is by the judgment of three Judges of the High Court, was erroneous; and if it were not erroneous, it tends very much to support the deed, because it is only to that deed that the possession can in any way be attributed. It was clearly a legal possession, and there was no pretence that they legally acquired the possession of Muddosoodun's share in any other manner. If that possession had been undisputed for any length of time, that would of course be an extremely strong circumstance in favour of the validity of the deed. That cannot be said to be the case here, because the dispute between the parties supervened so shortly after the execution of the deed, but still, as far as it goes, the possession of the respondents, however short, is a circumstance which cannot be disregarded.

Therefore, notwithstanding the suspicions which may rest in their Lordships' minds in respect of this transaction, whether by reason of the evidence of Wilson, which, however, is capable of being explained by supposing that he was mistaken as to the dates or as to what passed in conversation before him; or by reason of the non-delivery of the earlier title deeds, or by reason of the mysterious and unexplained circumstances attendant on the registration, their Lordships feel that there is not before them any grounds upon which they would be warranted in reversing the decision of three Judges of the High Court upon the merits, and that of two other Judges upon the question of possession, and in pronouncing this document to be a forgery.

They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

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The 29th June 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Mortgage—Foreclosure — Purchaser under decree—Judgment-creditor—Limitation.

*On Appeal from the High Court at Calcutta.**

Anundo Moyee Dossee and others,

versus

Dhonendro Chunder Mookerjee and others.

The plaintiff whose claim was based on the title of a person who purchased under a decree for sale in a suit for foreclosure of a mortgage, which suit was brought in the Supreme Court and was instituted prior to a sale under which the defendant claimed, contended that the defendant was bound by that decree for sale in exactly the same manner as if he had been a party to the foreclosure suit.

HELD that there was no foundation for such a claim and that the decree for sale had no operation whatever upon the title of a person in the country who was no party to the foreclosure suit.

The title of a judgment-creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor. The possession of such purchaser if *bonâ fide* and without notice of the mortgage is the possession of an owner; and a suit by a mortgagee against the purchaser founded on a title to enter into possession by reason of a default having occurred ought to be brought within 12 years after the commencement of the purchaser's possession.

Bishop of Winchester vs. *Payne* explained.

IN this case their Lordships are of opinion that the judgment and decree of the Court in India must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, when one looks at the plaint, scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who says he purchased under a decree for sale, which decree was made on the 15th of November 1852. The contention before their Lordships at first was that that sale was made in a suit for foreclosure of a mortgage, and that that suit for foreclosure having been instituted prior to a sale under which the defendants claimed, the defendants are bound by that decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

Their Lordships are of opinion that there is no foundation whatever for the claim so put; that the case to which they have been referred, of the Bishop of Winchester *vs.* Payne* has really no relation to any case of this kind. That case merely determines this, —that where there is a suit for foreclosure and a defendant to that suit makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, the purchaser will not be allowed himself afterwards to institute a new suit for a new foreclosure; the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that is simply a foreclosure, that is to say, that the person would be barred and foreclosed from instituting any new suit in the Court for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. It simply says, you shall not institute a fresh suit for redemption. This was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Court of Calcutta had no effect whatever *in rem;* it had no effect whatever over the property in the mofussil. The decree for sale was merely a decree in substance that the parties to the suit should concur in conveying and selling the property to a purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the country who were no parties to the suit. Therefore, it appears to their Lordships thatt he view of the case presented to them based upon that case of the Bishop of Winchester *vs.* Payne,* has really no application to the subject-matter of this suit.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the Supreme Court came to a conclusion in favour of the respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Court below.

Now one of the questions, and the most important question in their Lordships' judg-

* From the judgment of Norman, C. J., and E. Jackson, J., in Regular Appeal No. 634 of 1862, decided 12th September 1864,—1 W. R., 103.

* 11 Vesey, Junior, p. 194.

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ment, conclusive with regard to the matter which was raised, was this: whether the title of the defendants was anterior to the title of the mortgagee and was anterior to his mortgage. Their Lordships are satisfied upon the evidence that before the mortgage was made which is the foundation of the plaintiff's title, whether it was made in October 1841 or whether it came into existence some time between that and the date of the registration, which is the only thing before them, that is to say, the registration in May 1842, (whichever date be taken), at that time when that deed was executed, the property in question was actually attached under a decree of the Court, and that it was under a sale in pursuance of that original decree and of that execution that the title of the defendants accrued; and their Lordships are of opinion that the title of the defendants, independently of the Statute of Limitations, is paramount and superior to the title of the mortgagee.

As a great deal of argument has been addressed to their Lordships upon that question of the Statute of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the defendants was derived had been posterior to the mortgage, still the Statute of Limitations would have been a conclusive bar. Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in priority with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. The possession, which the man supposed he acquired, was a possession as owner. He thought he was acquiring the absolute title to the property and that he was in possession as absolute owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by, the purchaser; and there being no such notice, they are of opinion that the possession of the purchaser was the possession of a person claiming to be owner. Under these circumstances they are of opinion that if the title of the mortgagee to enter by reason of a default having occurred before had accrued, and if the purchaser under such a title had been in possession for twelve years, believing himself to be owner *bonâ fide*, under a claim to the ownership of the property, and not being in possession in any way as mortgagor or under the mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in India, according to the principles of those cases which their Lordships adopt, they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion that the judgment of the Court below is correct, and they will humbly recommend Her Majesty that the appeal be dismissed, and dismissed with costs.

The 30th June 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Share-holders—Limitation—Cause of action.

*On Appeal from the High Court at Calcutta.**

Syud Lootf Ali Khan,

versus

Mussamut Afzuloonissa Begum and others.

A sum of 2 lacs of rupees which had been paid by a debtor in part satisfaction of a larger sum due to the share-holders (among whom were the plaintiff and the defendants) the heirs of a deceased banker, according to their shares in the estate, was appropriated by the defendants. The several share-holders brought separate suits against the debtor for their separate shares, the result of which suits was that the 2 lacs was appropriated to the whole debt and the plaintiff's claim was thereby reduced by 25,000 rupees, while the defendants received 16,000 rupees more than that they were entitled to from the common debtor.

The present suit was brought by the plaintiff against the defendants for his full share of the 2 lacs. The defendants pleaded that the suit was barred by limitation, more than 12 years having elapsed from the date of the original payment of the 2 lacs.

HELD that plaintiff's cause of action arose out of the result of the former suits against the debtor, and not out of the original payment of the 2 lacs, and limitation ran, not from the date of the original payment, but from the time that the defendants received more than their proper share.

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* From the judgment of Seton-Karr and Campbell, J. J., in Regular Appeal No. 464 of 1864, decided 30th June 1865,—3 W. R., *Civil Rulings*, p. 113.

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Held also that the plaintiff was entitled to recover from the defendants, not the full sum of 25,000 rupees which he had lost as the result of the proceedings against the debtor, but the 16,000 rupees which the defendants had received over and above their proper share, and which must be considered as money had and received by the defendants to the plaintiff's use.

In this case their Lordships are of opinion that the decree of the High Court ought to be reversed, and the decree of the Zillah Judge maintained, with a variation which their Lordships will state.

The circumstances of the case are these. There was a very large bond debt, and apparently, as far as the evidence in this suit goes, that debt was a debt payable to the share-holders, the heirs of a deceased banker, according to their shares in the estate. Out of that debt, a sum of rupees 2,00,000 was paid, and apparently was paid in the respect of some of the shares of the defendants, and not in respect of the share of the plaintiff, the present appellant. The sum of rupees 2,00,000 having been thus paid, different share-holders were minded to bring separate actions against the debtor for their shares respectively of the balance, in each action assuming that the rupees 2,00,000 had been paid in respect of the share. But the debtor contended that he was entitled to have the rupees 2,00,000 appropriated in part reduction of the whole debt The result in all those actions was that the Court decided that the rupees 2,00,000 must (against the debtor) be appropriated to the whole debt, and in consequence of their so holding that it must be so appropriated, they cut down the claim of the appellant very considerably, and they enlarged the claims of the respondents and gave them a very considerable benefit,—the result being that from that mode of dealing with the payment of the rupees 2,00,000, the plaintiff lost rupees 25,000 of his share, and the defendants got, as they have admitted through all the proceedings, rupees 16,000 more than they were entitled to from the common debtor.

That being so, the appellant filed his plaint, saying, in effect, "You received the rupees "2,00,000 and it has been now decided that "that rupees 2,00,000 must be consi-"dered as being received on account of all "of us, and must be so considered from "the time when the Court so decided, and "you must account to me for my full share "of that sum." In this case the Judge of the Zillah Court did not take that view, but took it as a debt arising out of the result of the suits, and he came to the conclusion that the rupees 25,000, which the plaintiff had lost as the result of the proceedings based upon the new view taken of the original payment, was the sum which the plaintiff was entitled to recover from his co-obligees. The defence of the Statute of Limitations was pleaded and was overruled by the Zillah Judge. That defence of the Statute of Limitations was however sustained by the High Court. That defence would certainly not be applicable if the claim were based on or arose out of the result of the suits, and not out of the original payment. Their Lordships are of opinion that it did arise out of the result of the suits, and not out of the original payment, which, as far as the appellant and respondent are concerned, was clearly a payment made upon the footing that it was to be taken out of the share of the respondent; and it was not till the respondent had got more than his share that he could be said to have received any money to the use of the appellant, so as to give any ground of action.

But the case does not stand merely upon that. There was a document which appears originally to have been very much relied upon by the defendants themselves—the respondents—as a document excluding this claim. They said there was a deed of compromise made, by which the claim of the appellant to any share of anything which we have actually received is barred. On the other hand, the appellant's contention with reference to that deed was that there was a particular clause of that deed (the 11th clause of one deed, and the 10th of another similar deed), the effect of which he says is this:—"There is an appeal pending "between me and the debtor, in which I "am trying to get back what I can upon the "footing that the decision of the Court is "wrong about the two lacs of rupees. That "being so, the compromise is not to affect "that in any way whatever, and if any "claim should arise out of the result of that "appeal, any question upon that is reserved "as between us." The Zillah Court was of opinion that that was the true effect and construction of the deed, and in that opinion their Lordships concur. From that time it appears to their Lordships there could be no question as to the Statute of Limitations, as the thing was by contract between the parties reserved and kept open until the decision of that suit was arrived at, and very reasonably so, because if the plaintiff had succeeded in that suit in getting the money from the debtor, of course he would have had no manner of claim whatever against the respondents,

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who were desirous that he should proceed with that claim and should recover as much as possible from the other party and not from them. Their Lordships are of opinion that the decision of the High Court, that there was a bar under the Statute of Limitations, was erroneous.

But the Judge of the Zillah Court arrived at the conclusion that the plaintiff was entitled to recover the rupees 25,000, that is to say, the sum which he lost. Their Lordships are of opinion that that is not the true measure of the liability of the respondents, that they were not obliged to indemnify him from the loss which arose from the mode in which the suits against the debtor were dealt with; but that as they had received the rupees 2,00,000, and afterwards by the result of the proceedings they had received in respect of that same debt rupees 16,000 more than they admitted themselves to be the full amount of their claim, and as part of the same mode of dealing with them the rupees 25,000 loss had been incurred by the plaintiff, their Lordships are of opinion that upo every principle of equity the rupees 16,000 surplus so received was money had and received to the plaintiff's use, and that his claim to that amount was one of the things which he was entitled to make under the deed of compromise. Their Lordships are of opinion that there is nothing in the contention that this claim was not specifically made by the plaint in this suit. The plaint clearly states the circumstances under which the claim of the plaintiff arises. He cannot sustain his suit for the whole amount claimed, but there is nothing in his claim for the larger amount which deprives him of his right to recover the smaller amount, which, as the result of the facts pleaded and proved, their Lordships are of opinion is equitably due to him. It can only affect costs, and with those the Zillah Judge has dealt on the footing that the plaintiff had failed for the greater part of the claim.

Their Lordships will therefore recommend to her Majesty that the decree of the High Court should be reversed, and that the decision of the Zillah Judge should be affirmed with this variation, that instead of the sum of rupees 25,530 the sum of rupees 16,556 6-9 will be the sum inserted; to carry interest from the 21st September 1861 to the date of payment.

The appellant will have the costs of the appeal here, but no costs are to be allowed of either party of the appeal in the High Court. The costs as originally given in the Zillah Court will remain.

The 3rd July 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Minors—Collusive sale—Compromise—Practice.

*On Appeal from the High Court at Calcutta.**

Moulvie Abdool Ali,

versus

Mozuffer Hossein Chowdhry and others.

A suit by the plaintiffs' guardians for the plaintiffs' mother's share in certain dower resulted in a decree for 62,913 rupees, calculated on the allegation in the plaint that such share was ⅓rd of the entire amount of dower. That suit having been sold by the plaintiff's guardians for the alleged sum of 51,000 rupees, the plaintiffs brought the present suit to set aside that sale as collusive.

HELD that it was incumbent on the defendants in this suit to prove that they paid the 51,000 rupees to the plaintiffs when they came of age, or at least that the money reached the plaintiffs' hands when they came of age.

A compromise set up by the defendants in the present suit having been rejected, a decree was given to the plaintiffs for the sum of rupees 62,913 awarded in the original suit. That decree was upheld in appeal; but as it was alleged that on the facts stated in the plaint in the original suit the plaintiffs' mother's share of the dower was ⅛th, and not ⅓rd, the Privy Council held that plaintiffs ought not to benefit by that mistake, if it was a mistake, and they accordingly left it to the lower Court to enquire into that point and to let execution go for the ⅛th or the ⅓rd share, according as the fact might turn out.

Where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time instead of its being totally concealed from them.

The Privy Council will not interfere in a case in which objections are taken to matters of practice, unless they see very clearly that justice has not been done.

THIS is an appeal from a decision of the High Court of Judicature in Bengal, affirming and modifying a decree of the Principal Sudder Ameen of Backergunge, dated the 9th

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* From the judgment of Seton-Karr and Macpherson, J. J., in Regular Appeal No. 224, of 1865, decided 22nd March 1866,—see 5 W. R., Civil, 173.

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May 1865. The object of the suit was to set aside a sale of the interest of the plaintiffs in a former suit. The original suit, the sale of which was sought to be set aside, was a suit which had been brought by the guardian of the present plaintiffs on their account against their grandfather to recover the plaintiffs' share of their grandmother's dower. That suit had been sold to a lady, who appeared on the face of the sale to be the purchaser, for the price of 51,000 rupees. The plaint alleges that it was a collusive and a fictitious sale. In the answer the defendants allege that the suit is not maintainable, upon the ground that it was a valid sale ; and they say secondly, which is practically the same thing, that "the guardian of the plaintiffs having, "for their benefit and in lieu of an adequate "consideration, with the approval of their "father and the permission of the principal "head of their family, and their eldest paternal uncle, the said Meer Fujummul Ali, "*bonâ fide* sold the suit, No. 42,—any "claim in respect thereof cannot lie against "me, or against any one, save their guardian, father, and paternal uncle,—and the "said valid deed of sale is on no account liable to be set aside." It is remarkable that in this answer the defendants do not allege either that the original decree was obtained for too much money, nor yet do they allege, except most indirectly, and their Lordships are disposed to think they do not practically allege at all, that the defendant had ever paid the purchase money of 51,000 rupees either to the guardian on account of the infants, or to the infants after they came of age.

The next step in the present suit that appears is, that on the 9th of January 1865, there were applications by both the parties for the postponement of the hearing of the suit, on the ground that negotiations for a compromise were going on, and it was ordered by the Judge that "time be given to the "6th of February, which day is fixed for the "hearing of the suit; if no settlement takes "place within that time both parties must be "present with their evidence, otherwise "no objection will be admitted." It is important, with reference to the point which was subsequently raised, to observe that when the first application for postponement was made, the Judge most distinctly warned the parties that if the compromise did not take effect when the proper time came for hearing the suit, he should insist that it should be heard, and they must be ready with their evidence.

The next important matter that takes place is that in February (the native date is 20th Falgoon 1271), a deed of compromise, called a solehnamah, was actually executed. It is unnecessary to recite the terms of it, except that it is perfectly clear on the face of it that it gives the plaintiffs not only very much less than what the amount of the original decree was, but also very much less than the original compromise of 51,000 rupees. That solehnamah was registered on the 15th of March. There is also produced an alleged receipt, which the plaintiffs deny, of 2,000 rupees for the costs of the suit. Then on the 29th of April there is a further application by both parties for the postponement of the suit. It does not appear how it was not heard at the time originally appointed ; probably, although there is no formal order, some applications must have been made in the interval for the postponement, but on the 29th of April there is the application of both parties for a further postponement. There is this difference between them, that although it is clear that the deeds of compromise had been actually executed, and also actually registered at that time, yet the plaintiffs do not state that the matter had been compromised, but they state that negotiations for an amicable settlement are going on between the parties, but the compromise cannot be concluded unless an extension of time be granted, and therefore, the plaintiffs, notwithstanding that they had executed the deed of compromise, and notwithstanding the deed of compromise had been registered, clearly treat the suit as not being actually compromised, and the arrangement as not being actually made at that time. The petition of the defendant, no doubt, is in other terms, because he says, "whereas a "compromise has been come to between both "parties." On that the Judge orders that a week's time be granted, and the case be brought on for hearing on the 8th of May. Looking at the terms of his previous order, that also seems a clear warning that when the 8th of May came, if what he considered a valid compromise was not at that time effected, he should go on and hear the case. Then it also appears that on the same 29th of April a variety of witnesses were heard in Court both for the plaintiffs and the defendant ; and that also goes to show that the parties could not possibly have conceived that the suit was finally compromised at that time, for it appears that several witnesses, as many as five, were examined for the plaintiffs, and three were examined for the defendant. The witnesses for the plaintiffs depose that they were present at the time hen the origi-

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nal compromise was made, that no portion of the Rs. 51,000 was paid, and three of them state that the defendant said that he would pay it to the plaintiffs when they came of age. The witnesses for the defendant do not deny that. They speak to matters which for the most part seem immaterial as to whether the uncles of the plaintiffs and the plaintiffs were on amicable terms or not. That took place on the 29th April. There appears to have been one day further postponement, and on the 9th of May the suit came on for hearing, and then for the first time an application was made by the mooktear of the defendant to file this solehnamah on account of the plaintiffs, and the plaintiffs' vakeels themselves when called upon said they knew nothing at all about the matter. There were subsequently an examination of the mooktears, which did not throw very much more light upon it, but in that state of things the Judge was not satisfied, and he refused to accept the compromise, and then he went on to hear the suit. One other witness, one of the uncles of the plaintiffs, was examined, and the Judge came to the conclusion,—and upon the evidence as before him it is hardly disputed that the conclusion would be a correct one,—that the original compromise of the first suit was a compromise which by no possibility could stand, and that it must be set aside; and the defendant raising no defence that, if it was set aside, the decree obtained in the original suit was not a right and valid decree, the judgment was that they should have the benefit of that decree.

From that decree there was an appeal to the High Court, and the High Court sent a letter to the Judge below, requesting him to hear further evidence upon the question whether the plaintiff had assented to the filing of the solehnamah. That was all the matter that he was to inquire into, as the Judges of the High Court say, and their Lordships of course must give credit to what they say; although in the petition of appeal a complaint is certainly made that the first Judge in the Court below had not postponed the trial for the purpose of enabling further evidence to be given by the defendant. The Judges of the High Court, in their ultimate judgment, say that no such application was made to them, but that the only application respecting a re-hearing which was made to them was as to whether the solehnamah had been filed with the authority of the plaintiffs.

On that the case went down again to the Court below, and it appears by the judgment of the learned Judge of that Court that time was again given for the parties to appear. He summoned the plaintiffs, and he examined the plaintiffs, and also their mooktear, for the purpose of seeing whether they had assented to the filing of the compromise. They deposed that they had not assented to it, that there were certain conditions to be performed before the deed was filed, that the defendant had refused to perform those conditions, and that it had been filed by the mooktear of the defendant without their consent at the time and against their will. The Judge of the Court below reported that conclusion to the Supreme Court. Then the case came on again before the High Court, and they were clearly of opinion, as the Court below had been, that the original compromise had been obtained by fraud. They were also of opinion that the compromise in this suit had been improperly obtained; and then, an objection having been raised under the Statute of Limitations, in order to avoid all question that might be raised under the Statute of Limitations, they altered the form of the decree without changing the names of the parties in the decree, so as simply to declare that the defendant was a trustee for the plaintiffs, and that the plaintiffs were entitled to the benefit of that decree.

From that decision an appeal has been brought, and the two questions that have been substantially argued before us (independently of the third question as to amount, which will be alluded to presently) were first, that the Judge of the Court below had erred in not giving further time on the 9th of May for the hearing of witnesses as to the non-payment of the rupees 51,000; and, secondly, that he had erred in not giving the defendant an opportunity when it came down to him the second time to hear witnesses as to the validity of the compromise in the suit itself.

Now, both these objections are really objections to matters of practice, and unless their Lordships could see, and see very clearly, that justice had not been done, they would not interfere with the decision of the Court below on a question like this.

Now, the first question is, did the Judge of the Court below act improperly in not giving the defendant further time to produce witnesses to prove that he had paid the rupees 51,000? Now, how does the case stand? In the first place, in his original answer he nowhere alleges he had paid it; and certainly it is very difficult indeed to believe that if he had paid it, more particularly if, which

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their Lordships are disposed to think he must prove in order to have a defence to this suit, he had paid it to the plaintiffs when they came of age, or at least that the money had reached them when they came of age, it is difficult to believe that if he really had such a defence as that he would not have plainly alleged it. Then, secondly, it appears that the learned Judge of the Court below when he consented to the postponement of the trial, did most distinctly warn the parties that when the proper time for hearing came, if the compromise was not held to be valid, he should go on and hear the case. Next, it appears that on the 29th April, a variety of witnesses were examined in Court by both sides, which seems to show most clearly that both parties understood at that time, when the compromise had apparently been effected, that still if it was not held to be valid the suit would go on to be heard.

Next, it is said by the learned Judge in the Court below that a commission had gone to Dacca, and that no witnesses had been examined under it, and that that was the fault of the defendant; and then, besides that, the High Court say that this objection was never urged before them when the case came up before them for the first time; and if further inquiry was to be made, the defendant ought to have insisted on that when it came up for the first time, and not have allowed it to go back for further examination on one point, and then when it comes on again, say it is to go back for another further examination on another point. And, indeed, both the Courts below appear to have been thoroughly satisfied that this alleged want of witnesses hearing was a mere excuse, and that the whole object was an object of delay and to keep the plaintiffs out of their just claims, and their Lordships are disposed to agree with that conclusion,—at any rate they cannot dissent from it.

Then, did the learned Judge in the Court below err on the second question by not giving the defendant an opportunity of hearing witnesses to prove that the second compromise, the compromise of this suit itself, had been validly entered into? He gives his reasons himself. He states what he did :—"As, however, the High Court of "Judicature has, in accordance with the "objections raised in appeal in consequence "of respondents not having been represented, in letter No. 3871, dated 12th December, 1865, requested that this Court ascertain whether the deed of solehnamah was "filed with the cognizance and consent of "the plaintiffs, and make a report, this "Court, in compliance with the said orders, "so as to remove all doubts and objections, "on receipt of the order required the personal attendance of the plaintiffs, who "having arrived from Dacca, and having this "day, the 6th January 1866, attended Court "and being questioned"—then he states the substance of their evidence, and of the evidence of their mooktear. Then he goes on to say,—"The defendant, through his pleader "Bykant Chunder Bose, also files copy of "the counterpart of the solehnamah, and "wishes also to file a list of witnesses to "establish that the compromise did actually "take place; but as the list was not filed "on the 18th December 1865, the personal "attendance of the plaintiffs was required "within ten days, and since a further postponement was made, this Court does "not consider postponing the report called "for any longer for proofs." Therefore it appears that originally the defendant asked for leave to file a list of witnesses to establish that the compromise did actually take place, which, as it turned out, was not a matter which the plaintiffs denied. That list was to be filed by the 18th December. It was not filed on the 18th December. Then ten days' further time was given, that is, to the 28th December, and then it was ultimately not heard on the 28th December, but was further postponed till the 6th January. The defendants then, apparently, were not ready with their witnesses, and when the Judge was determined to go on they asked for still further time. Then the Judge comes to the conclusion that that is all a shuffle, and that they do not really want to bring the witnesses and that the whole proceeding was for the mere purpose of delay. It appears quite evident that their Lordships cannot dissent from that conclusion. The High Court came also to the same conclusion, and, independently of this question, of whether the learned Judge of the Court below had given a proper opportunity to the defendant of being heard, it hardly appears to be arguable that this deed of compromise in the first suit itself can possibly stand. The very admitted facts show that it cannot stand. Here the guardian of two infants makes what appears to be an alleged sale on the face of it, to a perfectly independent person. After that sale is made, the case goes on just the same as if no compromise had been effected at all. There is an elaborate judgment of the Court in the original suit, disposing of all the objections that had been raised in it,

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when in point of fact it appears now that there was no real suit at all at that time, and the whole thing was a fiction, the defendant having brought the suit himself. It is impossible that a proceeding so obtained can possibly be supported in any Court. If there really had been an honest compromise made, the practice of the Court is quite plain as to how that compromise ought to have been carried out; it ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them. Therefore it is plain it must be set aside, and there is not the least reason to suppose that any portion of this Rs. 51,000 was paid. There is strong evidence that none of it was paid, and there is no evidence at all to the contrary. Therefore their Lordships are of opinion on the merits that this appeal ought to be dismissed with costs.

But then a further question was raised. It was argued by the Counsel for the appellant, though that question has never been raised in either of the Courts below at all, that on the face of the original plaint it appeared that the judgment in the original suit had been obtained for a very much larger sum than on the facts, as explained in the plaint in the original suit itself, the plaintiffs could possibly be entitled to. It was not substantially denied by the Counsel for the defendants that, if the facts actually happened as they appear to be recited in the original plaint to have happened, the mother of the plaintiffs instead of being entitled to one-third of the whole amount of the dower would only be entitled to one-eighth. The result of the calculation, as their Lordships have made it out, is that instead of the plaintiffs being entitled to 62,913 rupees with interest, which is the sum for which the original decree was given, they would only be entitled to 30,333 rupees with interest. Their Lordships, after consideration, are of opinion that if that is accurate, the plaintiffs, who come for equitable relief in setting aside this invalid sale on the ground that it is fraudulent, if it appears on the original plaint that they have by a pure mistake obtained judgment for a great deal larger sum than they ought to have done, ought not to obtain the benefit of that mistake. But their Lordships cannot be perfectly certain as to how the facts in that respect really are, because it certainly seems extraordinary that this point appears never to have been raised either in the original suit or in the present suit in any of the Courts. The original plaint is not in the record, but only the recital of it. Therefore, what their Lordships propose to do under those circumstances is to recommend to Her Majesty that the decree of the High Court be affirmed with costs, but subject to the following proviso and declaration; that is to say, inasmuch as it has been represented by the Counsel for the appellant on the hearing of this appeal that, assuming the pedigree of the family to have been as stated in the plaint filed in the original suit of Meer Abdool Mujeed Chowdry, the share of Eaden Missa in the estate left by Ruheemun Nissa was, according to Mohammedan law, one-eighth only instead of one-third as stated in the said plaint, and that the share of each of the respondents, the plaintiffs in the present suit, in the estate left by the said Eaden Missa being according to Mohammedan law one-fourth, the said respondents were on the face of the plaint entitled by Mohammedan law to at most one-sixteenth of the sums in question, instead of the proportion therein mentioned, that is to say, to the sum of Rs. 30,333-5-4, instead of Rs. 62,913-9-3; and inasmuch as the record in the said appeal does not afford sufficient grounds for determining the correctness of such representations, it is ordered that execution is not to be issued for any greater amount than the said sum of Rs. 30,333-5-4, with interest thereon, from the 29th July 1859, and the costs payable by the appellant in the two suits and the costs of the appeal, unless and until the said respondents shall show to the satisfaction of the High Court, that according to Mohammedan law and the pedigree of the family, they were at the time of the institution of the original suit entitled to some larger sum than the said sum of Rs. 30,333-5-4, in which case execution may be issued accordingly.

The 3rd July 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Consideration money — Sale—Registration — Denial of execution — Act XX of 1866.

*On Appeal from the High Court at Calcutta.**

Futteh Chund Sahoo,

versus

Leelumber Singh Doss and others.

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* On Appeal from the judgment of Kemp and Phear, J. J., in Regular Appeal No. 282 of 1867, decided on the 30th March 1868,—not reported.

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An instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question,—for what in equity did presently operate as a sale of the property,—is an instrument which by the 2nd Section of Act XX of 1866 is required to be registered, and cannot be received in evidence under Section 49 if it has not been registered.

Where a person who is alleged to have executed a deed denies before the Registering Officer that the deed was executed by him, the Zillah Judge, having regard to the provisions of Section 84 and the form of the petition given in the Schedule to the Act, has jurisdiction to determine such a question.

In this case the appellant brought his suit, which was in the nature of a bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a deed of absolute sale executed; and he added that the suit was also for issuing "an order for its registration." Their Lordships understand those words to import a prayer that the deed of absolute sale when executed might be ordered to be registered; and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted with a view to meet the difficulties which it was apprehended might be occasioned by the prior registration of the defendant's document of a date subsequent to that of the instrument on which the appellant sued. The Court of first instance found that this instrument was not one which the Registration Act now in force required to be registered and admitted it accordingly in evidence, and upon the merits made a decree in favour of the plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Act requires to be registered and which had not been registered, it was not receivable in evidence, and that therefore there was no foundation for the plaintiff's suit. The decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act recently passed in India is extremely stringent. Their Lordships have, in the first place, no doubt whatever that the instrument in question is one which, by the second Section of the Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, for what in equity did presently operate as a sale of the property. The forty-ninth Section of the Act says that no document that has not been registered under the Act, supposing it is one which ought to be registered, is receivable in evidence. The procedure which the Act prescribes is of this kind:—The party seeking to register a deed is, under the thirty-sixth Section, to go first before the Registrar, or, as in this case, a Sub-Registrar. If the Sub-Registrar refuses to register the deed, there is then an appeal from his refusal, upon whatever reasons it is founded, to the Registrar, the next higher officer, and if that person confirms the order refusing the registration, the eighty-fourth Section gives to the party aggrieved the power of going by petition to the Zillah Judge. In the present case the Sub-Registrar and afterwards the Registrar refused to register the instrument, because the parties, the respondents, by whom it purported to have been executed, denied that they had executed it. It has been argued that the Act affords no means for trying such an issue as was thus raised; and consequently that unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution can be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the eighty-fourth Section, and the form of the petition given in the schedule, and in particular to the fourth paragraph of that form, which contains the words "the said C D appeared "personally before the Registrar and falsely "denied the execution of such instrument," think that the Zillah Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine that there must also be power to summon witnesses, if witnesses should be necessary. How the Zillah Judges may deal with this statutory jurisdiction, their Lordships are unable to say. It seems, however, reasonable to suppose that if they saw that a *primâ facie* case of execution of the deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document; and, on the other hand, it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

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Well, then, how do the facts stand upon this case? The appellant went before the Sub-Registrar, and he appealed to the Registrar He then, unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth Section, in which case he might have obtained the registration of the deed in the way I have suggested, and brought this suit relying on a non-registered deed. He failed to pursue the remedies given him by the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful though stringent statute, the Judges of the High Court have miscarried in ruling that the document, not having been registered, was inadmissible in evidence, and that the plaintiff's suit had wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special order, such as that suggested by Mr. Bell, seems to their Lordships to be beyond the functions and province of an Appellate Court. It may be that the appellant may be able partially to obtain relief, since part of the consideration money seems to be still in his hands. Their Lordships, however, dealing with this appeal, have but one course before them, which is humbly to recommend Her Majesty to dismiss the appeal with costs.

The 4th July 1871.

Present :

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Boundaries — Local investigation — Absence of parties.

*On appeal from the High Court at Calcutta.**

Meer Mahomed Tuque Chowdhry,

versus

Judonath Jha and others.

In a case in which plaintiff sued to recover some land and in which defendant denied the power of plaintiff's vendor to sell the land claimed, or a part of it, a local enquiry was ordered to ascertain the boundaries of the land in dispute. Judgment of the High Court,—upholding the decision of the lower Court which dismissed the suit because plaintiff failed to appear or take proper steps before the Ameen at the local investigation and because he omitted to give formal proof of his deed of purchase,—confirmed.

* From the judgment of Raikes and Seton-Karr, J. J., in Regular Appeal No. 309 of 1863, decided 3rd February 1864,—not reported.

In this case the plaintiff brought his suit to recover some land. He was met by a case on the part of the defendants which alleged that the person from whom he claimed had no power to sell the land claimed, or at least part of it. Therefore it was necessary that the boundaries of the land in dispute should be clearly pointed out. A local investigation was accordingly directed to ascertain those boundaries. The Ameen appointed to conduct the investigation went to the spot. The plaintiff either failed to appear before him altogether, or if the persons who, after some delay, did appear, were his agents (a fact which he has some times disputed) suggested that the boundaries were erroneously stated in the plaint. The result was that no report concerning the boundaries was made to the Court, and the parties again appeared before it. On this second appearance, the plaintiff does not appear to have taken any objection as to the proceedings of the Ameen, and the Court upon that ground, and also upon the ground of his having omitted to give formal proof of his deed of purchase, dismissed the suit. In fact, there was no evidence whatever in support of his claim before the Court, except the production of the unproved kowala or bill of sale. He then appealed to the High Court, and his complaint there was not so much that his suit had been dismissed because he had failed to prove his case, as that the lower Court had not given him further time or directed a second local investigation.

The High Court, dealing with this as a pure question of practice, said that he had not given any sufficient excuse for his former laches, and on that ground dismissed the appeal. Then he comes here, taking objections some of which he never took in the Court below, and asks us to reverse that decision. We cannot see that there are any grounds for doing this; and their Lordships, therefore, will humbly recommend Her Majesty to dismiss this appeal with costs.

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The 4th July 1871.

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Evidence—Long possession—Issumnovisee returns.

*On Appeal from the High Court at Calcutta.**

Farquharson,

versus

The Government of Bengal and others.

The plaintiff, the purchaser of a putnee under a sale for the non-payment of the rent of the putnee, sued the defendant, who was in possession of the land included in the putnee, for a right to increase the rent of the land and have a proper rent payable to him out of the land. He relied solely on three issumnovisee returns for three separate years, in each of which returns the land said to be in possession of the Ghatwal, the defendant's predecessor, was entered as 100 beegahs. The defendant adduced the evidence of two aged witnesses who stated that so long as they remembered the property the quantity of land in the Ghatwalee tenure was 3,000 beegahs. The lower Court dismissed the plaintiff's suit, holding that the defendants had been in possession of 3,000 beegahs, and not 100 beegahs as alleged by plaintiff, and that the defendant had been in possession for more than 60 years. The High Court confirmed the decree of dismissal of plaintiff's suit.

HELD (in affirmance of the concurrent decisions of the lower Courts) that the long uninterrupted possession of the Ghatwal was clearly entitled to have greater weight than the issumnovisee returns.

THIS suit was originally brought to recover a large quantity, nearly 3,000 beegahs, of land. The plaintiff, who was the purchaser of a putnee under a sale for the non-payment of the rent of the putnee, claimed that under the Act VIII of 1819, Section 11, having purchased under those circumstances, he was entitled to set aside all estates which had been created after the origin of the putnee, and to recover all the lands which were originally part of the putnee. However, it appearing that the defendant had been in possession of those lands for a very long time, the plaintiff afterwards admitted the defendant's right to the possession of the land, and sued for a right to increase the rent and have a proper rent payable to him out of the lands.

The evidence which the plaintiff produced in support of his case entirely consisted of three documents. At first only one document was produced, which was an issumnovisee of the year 1811. Subsequently two other issumnovisees were produced, which are returns made by the Police, and there is evidence to show that they are made generally on the information of the Ghatwalee holder, stating his name, the quantity of land which he holds, and the pujjak rent which he pays for it; and it appears in all the returns for those three years, that the then holder of the estate which the defendants now hold, the Ghatwalee holder, had returned that the quantity of his land was 100 beegahs. That was the sole evidence for the plaintiff. He did not produce any evidence at all to show how it happened that if 100 beegahs was all that the Ghatwalee holder was entitled to in the years 1811, 1812, and 1813, that quantity of 100 beegahs had been allowed to grow by encroachment unchallenged to the very large quantity of 3,000 beegahs at the time when the sale took place. On the other hand, the defendant produced evidence to show that as far back as living memory went, the whole quantity of 3,000 beegahs has been held by him as part of his Ghatwalee land. He produced one witness of eighty years old and another of seventy-five years old who had known the land all their lives, who said that the Ghatwalee holder had held the whole 3,000 beegahs during all the time that they remembered the property. Both the Courts below believed those witnesses, there being no evidence whatever to contradict them, and thought that for sixty years the land had been so held. Then the question arose as a simple question of fact before the Courts below, taking the evidence on both sides, whether they ought to find that this original estate of the Ghatwalee holder consisted of 100 beegahs only, or of 3,000 beegahs. Both the Courts below found, as a matter of fact, on this evidence that the original Ghatwal consisted of the whole number of beegahs of which the defendant was in possession, and that, therefore, the plaintiff was not entitled to maintain this suit.

Their Lordships entirely agree with these decisions. Not only does this case come within their ordinary rule, that on a mere question of fact where both the Courts below have agreed and where there has been no mistake in point of law, they will not reverse the decisions of the Courts below, unless they can see that those decisions are clearly wrong; but their Lordships have come to the same conclusion. It appears to them that weight must be given to ancient possession, and that there may be a variety of causes to explain why this quantity was inserted in the returns

* From the judgment of Bayley and Markby, J. J., in Regular Appeal No. 13 of 1866, decided on the 23rd July 1867,—8 W. R., p. 232.

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in these years. They may have stated the amount under cultivation or producing profit only. It may have been that the police officer was careless and did not care about what he returned, or it may have been that the Ghatwalee holder at that time had some reasons for giving incorrect information; or possibly it may have been that the ancient Ghatwals originally held only 100 beegahs, but that the estate had increased to 3,000 beegahs many years before, and before the creation of the putnee, which, notwithstanding the Act VIII of 1819, would entitle the Ghatwalee holder to hold, as against the putneedar at least, the whole quantity. But whatever the reason may have been, their Lordships are of opinion that the long uninterrupted possession of the Ghatwalee holder ought clearly to have greater weight than these returns. Upon those grounds, therefore, they think that the judgment of the Court below must be affirmed.

With respect to the cases which have been referred to, all that they really show is this, that different Courts at different times have given greater or less weight to similar returns. All the Courts agree that they are admissible in evidence, and they have been admitted in evidence in this case. In each particular case the Courts have considered what weight ought to be given to them; and it is nothing very surprising if the Courts at different times have not given exactly the same weight to these documents. Their Lordships are of opinion that the Courts in this particular case have given quite as much weight to these returns as they deserve, and the weight of evidence cannot be regulated by precise rules, as the admissibility of evidence may be.

Their Lordships will, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 5th July 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Bond—Registration.

*On Appeal from the High Court at Calcutta.**

Baboo Gungapershad

versus

Mowjee Lall.

The mere circumstance of a bond not being registered is not sufficient by itself to counterbalance the evidence if it is generally satisfactory in proof of the validity of the bond.

THIS is an action on a bond which was given accompanied by a mortgage, and it also seeks to set aside a subsequent sale by defendant, who granted the bond of the property mortgaged to his wife; and the defence was that the bond was a forgery and was never executed by the defendant. The Principal Sudder Ameen, the first Judge who heard it, and who also heard the witnesses, came to the conclusion that the bond was executed. The High Court came to a contrary conclusion; and their Lordships have to determine on which side the evidence really preponderated, and with which of the two judgments they agree.

Now the signature to the bond was in the first instance proved by the plaintiff, by two of the attesting witnesses, and by the mooktear who wrote the bond and framed it. The defendant denied that it was his signature, but he did not call any evidence at all to prove that the bond was not in his handwriting, neither did he produce any of his undoubted signatures in order that the Court might have the opportunity of comparing the disputed signature on the bond with his admitted signatures. Therefore, as far as depends on the direct evidence whether the bond was genuine or not, the evidence on the part of the plaintiff in support of the genuineness of the bond appears very greatly

* On appeal from the judgment of Seton-Karr and Macpherson, J. J., in Regular Appeal No. 65 of 1866 decided on 11th May 1866,—not reported.

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to preponderate, because there is the evidence of the attesting witnesses and of the person who drew it; and there is nothing against it but the evidence of the defendant himself.

But then the circumstances under which the bond was alleged to be executed have to be considered for the purpose of seeing whether it is probable that such a bond should be executed or not. It appears that there were two sons of the defendant who carried on business; one of them appears to have been not more than fifteen years of age at the time of the trial of the suit, and therefore he must have been very considerably younger at the time when the bond was executed; and as respects the other son, it appears that he admits that he had no money of his own at all, and that all the money he had he procured from his father. There is some further evidence given as to what had happened in other suits, which may tend to prove that the defendant was a partner in the house of his sons, or rather, in fact, that he was carrying on business in his son's name. The High Court appear to have believed that; at least they say that they do not come to any contrary conclusion on that part of the case. Then it appears that the sons, or the house of business, were unquestionably in some difficulties at the time when this bond was given; and it also appears that one of the brothers of the plaintiff had married a daughter of one of the defendants. Then the bond is given for two separate debts; one a debt of rupees 25,000 due to the first plaintiff, and another, a debt of rupees 5,000 due to the second plaintiff. The first strong corroboration on the part of the plaintiff's case was the entries in the books of the defendant's two sons, and these unquestionably prove beyond all question that these two debts of rupees 25,000 and rupees 5,000 were due, and therefore there is no doubt that there was an actual debt of rupees 30,000. They add up those two sums which are entered in the cash-book—"amount due to "you rupees, 25,000 besides which there is "due to Musoodun Lall rupees 5,000, in all "rupees 30,000," and then it mentions the date, which is the same date as the date of the bond; then it states the interest, and then it states rupees 1,000 for Gungapershaud's paper. The sums of principal are added together, and the two sums of interest and the sum for the stamp are also added together. That is very strongly relied upon, and their Lordships think properly relied upon, by the Principal Sudder Ameen, as showing that some security or another was given for the entire debt. Then one of the defendants, the elder son, who carried on this business, was called to explain this. No doubt he tries to give an explanation that a chitta was given for the rupees 25,000, and a separate one for the rupees 5,000, and that the rupees 100 stamp was the stamp which was got for the rupees 25,000. That, their Lordships think, is not altogether a satisfactory explanation. It was not brought forward by him in the first instance. It came out on cross-examination, and appears to be nothing more than the natural sort of explanation that a man might be driven to who saw what strong evidence this account gave against him.

Then, there is a further confirmation by the evidence of one of the defendant's witnesses, who appears to have been present at the time when the deed was executed by which the defendant professed to sell the property mortgaged to his wife; and there on cross-examination, he certainly appears to say—"Having written the deed "of sale, I made it over to Mowjee Lall. "Mowjee Lall took it away with him to his "house. Mumtauz Ally, in that mujiles "(assembly), and in the presence of Mowjee "Lall spoke about the Tamoosook to Gun-"gapershaud, and the pledge, on which "Mowjee Lall said, 'he has to do with his "own money, what business is it of yours?'" The great importance of that evidence rests on this, that it appears to prove by the evidence of a witness called on the part of the defendant, that the bond was in existence prior to the time when the deed was executed by which the defendant sold his property to his wife; and if that were the case, then that gives an answer to the theory of the High Court, who are of opinion that this bond was forged for the express purpose of defeating that deed in order that they might apparently have a mortgage which would take precedence of that deed.

Then the other matter that is relied upon as against the genuineness of the bond, is the stamps. It appears that there are two rupees 50 stamps on it. They appear to have been purchased only a short time before, in the month of April, and they appear to have been purchased by a person who was one of the witnesses to the bond. That person was not called, and it does not appear whether he was a witness who, in fact, belonged to and was connected with the defendants, or whether he was a witness connected with the plaintiff; and it appears perfectly consistent that the defendant's sons, or the defendant, in their ordinary

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business having purchased two rupees 50 stamps a short time before, had inserted it on this bond, and that is the reason why it is charged in the accounts.

Then, another matter which is strongly relied upon is the non-registration of the bond, and it may be admitted that, *valeat quantum*, that is evidence to some extent against the genuineness; that is to say, it seems more probable that it would have been registered, because it appears by an Act which was then in force, unless it was registered it would not be binding, at any rate, as against a subsequent mortgage. That it would not bind as against a subsequent sale appears more doubtful, but at any rate, not as against a subsequent mortgage. On the other hand, it is said that it may have been understood at the time that it was not to be registered. The parties were at that time friends, and to a certain extent connections, and registering a bond of this kind might destroy the credit of the house and bring them at once to insolvency, and therefore it well may be that it was understood at the time it should not be registered. There appears some reason for that, because by the laws of registry, when a deed is registered the Registrar requires that both parties should be present, either by themselves or by somebody appointed by them; and therefore if a person executes a bond of this kind, and says "I will give you a bond, and I "will put a charge on my property, but I "will not consent to have it registered, it "must be an understood thing that it shall "not be registered." If that is the understanding, the other side apparently cannot get the deed registered at all; at any rate, they could not do so without a suit, which there might be great difficulty under such circumstances in maintaining, and therefore it does not appear anything extraordinary that the defendant should have said "I gave a bond for this debt of my sons, "which I know I am in all probability "liable for myself. I make it payable in "two years. I get two years' credit, and I "will charge my estate with it, but it must "not be registered." There is nothing very extraordinary in an agreement of that sort being entered into. At any rate, their Lordships are of opinion that the mere circumstance of its not being registered is not sufficient by itself to overbalance the evidence which appears to their Lordships to be generally satisfactory in proof of the validity of the bond.

Then assuming the bond to be genuine, it is hardly necessary in this case to determine whether the subsequent sale would, if it were a really valid sale, prevail against the bond, for it appears very clear to their Lordships that the sale was a sham; in fact, that it was no real sale, and there is no satisfactory evidence of a farthing of money being paid under it, and it looks simply like a pretended sale made for the express purpose of defrauding the defendant's creditors. Their Lordships are of opinion that the defendant has produced no evidence at all which really is of any value in contradiction to the case of the plaintiff.

Their Lordships will recommend to Her Majesty that the judgment of the High Court should be reversed, and the judgment of the Principal Sudder Ameen should be affirmed, and that the plaintiff should have the costs before the High Court, and also the costs of this appeal.

The 12th July 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Pleadings—Different case in appeal.

*On Appeal from the High Court at Calcutta.**

Mussamut Kumeeroonissa Begum,

versus

Mirza Syuffoollah.

Judgment of the High Court dismissing a plaintiff's suit confirmed on the evidence, in a case in which plaintiff sought in the Lower Court to set up a deed of alleged sale from a Mahomedan purdanusheen lady in favor of her niece, which position he abandoned before the High Court, where he suggested that although it was not good as a deed of sale, it would be good as a deed of bounty, the sale being colourable for the purpose of giving effect to a gift which otherwise it might be difficult to make under the Mahomedan Law.

THIS is an appeal from a judgment of the High Court which affirmed the judgment of the Principal Sudder Ameen, setting aside a

* From the judgment of Norman and Campbell, J. J., in Regular Appeal No. 303 of 1865, decided 9th April 1866,—5 W. R., *Civil*, p. 198.

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deed which on the face of it purports to be a deed of sale for rupees 9,000 of property, which was alleged, and without contradiction, to be worth rupees 100,000. The alleged sale was by a Mahomedan lady, a Purdanashin, during a very severe and painful illness, of which she died within a few days afterwards. The vendee was the niece of the lady, and the deed was prepared by the directions of the niece's husband. The Court below, upon hearing all the evidence, and upon looking at the nature of the transaction, the nature of the deed, and the value of the property, came to the conclusion that as a matter of business, treated as a sale, the deed under the circumstances could not stand. Then, when it came on appeal to the High Court, the ground upon which alone the case was pleaded and tried in the Court below, that is, that it was valid as a deed of sale, treating it as a matter of business, was wholly abandoned, and it was then suggested, as it has been suggested before us, that, although it was not good as a deed of pure sale, it would be good as a deed of bounty, the sale being colourable for the purpose of giving effect to a gift which otherwise it might be difficult to make under the Mahomedan Law. The High Court, after having heard an elaborate and learned argument from the same Counsel that we have heard to-day, and having heard all the points suggested there, came to a conclusion in which their Lordships entirely concur, namely, that there is no evidence sufficient to satisfy the burden of proof which lies upon every person who endeavours to sustain a deed of this kind as a deed of gift from a person *in extremis* where the thing has assumed on the face of it a totally different character, and where, in the first instance, it is pleaded and endeavoured to be supported as a deed of such different character.

The High Court having come to the conclusion that there was not sufficient to satisfy them, their Lordships are of the same opinion, and, therefore, will humbly recommend Her Majesty to dismiss this appeal with costs.

The 17th July 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Mortgage—Limitation—Purchaser.

*On Appeal from the High Court at Calcutta.**

Brojonauth Koondoo Chowdhry and others,

versus

Khelut Chunder Ghose.

B and *C* were respectively the 1st and 2nd mortgagees of property which were mortgaged to them by *A*. The mortgages were in the English form and contained the usual proviso for redemption, and also a proviso that the mortgagor should continue in possession until default was made when an express entry was given to the mortgagee. During the continuance of the mortgages, *D* purchased the property in question from the Assignee in insolvency of *E*, who had purchased it from *A*. *E's* purchase was made upwards of 12 years before the institution of this suit and had been followed for upwards of 12 years by registration and mutation of names in the Collectorate. *A*, the mortgagor, made default, much more than 12 years before the commencement of this suit *B* having obtained a decree for foreclosure in a suit which he brought against *A* alone, *C* paid *B* off, took a transfer of his mortgage, and in his turn sued *A* alone and obtained a decree for foreclosure. *C* then brought this suit against *D*, who pleaded 12 years' limitation in bar.

Held that *C* acquired no right against *D*, who was no party to the foreclosure proceedings, except that which was conveyed to him by his securities, and the right he had under the mortgage deed was to obtain possession of the land, his cause of action as to which accrued when the mortgagor made default; and as that was more than 12 years before suit *C* was barred, the exception in Section 6, Act XIV of 1859, not applying to this case, *D's* possession being in no sense possession by permission of the mortgagee.

In this case the only question to be decided is whether the High Court was justified in holding that the suit was barred by the Statute of Limitations.

The plaintiff was a mortgagee, originally a puisne mortgagee, but who had acquired the rights of the first mortgagee, as afterwards stated.

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* From the judgment of Peacock, C. J., and L. S. Jackson, J., in Regular Appeal, No. 196 of 1864, decided on 29th September 1866—6 W. R., Civil Rulings, 269.

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The defendant was the purchaser from the assignee in insolvency, of a person who had purchased the property in question from the mortgagor. The original purchase from the mortgagor was upwards of twelve years before the commencement of this suit, and for upwards of twelve years had been followed by registration and mutation of names in the Collector's book, the order for which was made on the 15th January 1850.

At the time of the sale the property was subject to mortgages, made in the form of an English mortgage, with the usual proviso for redemption, and a proviso that the mortgagor should continue in possession until default, and on default an express right of entry was given to the mortgagee.

Much more than twelve years before the commencement of this suit such default was made.

After the sale under which the defendant claims, the first mortgagee instituted a suit for foreclosure in the Supreme Court of Fort William. This suit proceeded to a foreclosure *nisi* on the 11th December 1850, and which was made absolute on the 9th February 1852.

The plaintiff, however, procured that foreclosure to be opened, paid off the first mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the mortgagor, and obtained his final decree for foreclosure on the 15th day of July 1862.

To these foreclosure proceedings the purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the plaintiff commenced this suit against the defendant, who pleaded his twelve years' possession in bar. The plaint was filed on the 27th August 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the mortgagee, who was content to rest on his security, and the mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was contended that until the foreclosure put an end to the security as a security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended that the defendant who derived his title under a purchase from the mortgagor could not be in a more favourable position than the mortgagor himself.

The foreclosure proceedings did not affect the defendant or the property in question, and it is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property.

As against the defendant the plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of the Indian law are:—

"To suits for the recovery of immoveable property, or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."*

To this there is one exception in respect of mortgage, which is this:—

"In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt."†

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even to the case of the original mortgagor himself continuing in possession and paying interest to the mortgagee.

The judgment of the High Court appears to be that the bar extends even to such a case where not provided for by that Section. The ruling however was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court

* Clause 12 Section 1 Act XIV of 1859.

† Section 6 Act XIV of 1859.

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which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation ; and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might, in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee; and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old,—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without passing an opinion whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in the particular case is correct.

It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in India. Their Lordships do not share in that apprehension. It may be and probably is better that mortgagees keeping their securities locked up in their strong box and allowing the mortgagor to be the visible owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bonâ fide* purchasers and persons claiming under them after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed, and the appeal dismissed with costs.

The 17th July 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Limitation — Del-credere agent — Clause 9 Section 1 Act XIV of 1859.

On Appeal fron the High Court at Calcutta. *

Dukur Pershaud Bustooree,

versus

Mussamut Foolcoomaree Dabee.

A suit against a *del-credere* agent on a balance of accounts in respect of dealings regarding which there is no express written contract is governed by the three years limitation prescribed by Clause 9 Section 1 Act XIV of 1859.

THIS was a suit brought by the appellant, who was the manager of a factory in Moorshedabad, against the respondent, who carried on an old established business of broker, to recover a sum of 16,051 rupees and interest alleged to be due on the balance of an account. The defendant had for several years sold the goods of the plaintiff's firm, and according to the finding of the Principal Sudder Ameen, the correctness of which was

* From the judgment of Peacock, *C. J.*, and L. S. Jackson, *J.*, in Regular Appeal No. 128 of 1866, decided 24th January 1867,—See 7 W. R., p. 67.

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not disputed before us, had received a pucca or *del-credere* commission, which made her liable to the plaintiff for all goods sold which were not paid for by the purchasers. As there was no proof that any part of the price of the goods in respect of which this suit was brought had been received by the defendant, the claim against the defendant was only supported upon the ground that as she received a *del-credere* commission, she was liable for the price of all goods sold by her for the plaintiff. It was admitted that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The statute of limitation was pleaded, and the sole question to be determined is whether, under the circumstances previously stated, the suit is barred by the Indian Statute of Limitations, Act XIV of 1859. The High Court held that the case came within the 9th Clause of the first Section, as a suit brought for the breach of a contract; and the Chief Justice in giving judgment says—"Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms upon which we find them carrying it on. It was an engagement on the part of the defendant that she would sell the plaintiff's cotton, and that she would guarantee the purchasers. That was a liability on the part of the defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the plaintiff. It therefore falls within Clause 9 of Section 1. It is a suit for a breach of a contract not in writing." It was urged before us on the part of the appellant that the High Court had put a wrong construction on the words "breach of any contract," as used in the Clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract from actions to recover debts, and that the enumeration in the Clause itself and in the 8th Clause of several debts with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "suit for the breach of any contract," and that the present suit was in substance a suit to recover a debt or liquidated sum of money, and that the period of limitation was six years under the 18th Clause of Section 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in India respecting the proper construction to be put on the words "for the breach of any contract" in the 9th Clause. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real debtors for the price of the goods sold are the purchasers of the goods, and the broker is only sued upon his collateral undertaking that in consideration of the commission paid to him he will pay the price of the goods if the purchaser fails to do so. An action in such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed with costs.

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